THE CODE

OF

CIVIL PROCEDURE

ACT XIV OF 1882.

WITH NOTES

AND

AN APPENDIX.

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ABBREVIATIONS.

1 AGRA	...	Reports of cases decided in the High Court of the North: West Provinces at Agra, 1866 to 1868.
1 ALLA.	...	Reports of cases decided in the High Court of the North: West Provinces at Allahabad, 1869 to 1875.
1 B. L. R.	...	Bengal Law Reports.
B. L. R. F. B.	...	Bengal Law Reports, Supplementary volume.
1 BOM.	...	Bombay High Court Reports.
BOULN.	...	Boulnois' reports.
1 CAL. R.	...	Calcutta Law Reports.
COR or CORYT.	...	Coryton's Reports.
IND. JUR.	...	Indian Jurist.
IND. JUR. (N. S)	...	Indian Jurist, New Series.
1 IND. CAL.	...	Indian Law Reports, Calcutta Series.
1 IND. BOM.	...	" " " Bombay Series.
1 IND. ALLA.	...	" " " Allahabad Series.
MARSH.	...	Marshall's Reports.
1 MOORE	...	Moore's Indian Appeals.
1 SEL. REP.	...	Select Reports of cases determined in the Court of Sudder Dewanny Adawlut.
S. D. A., 1860	...	Reports of the Sudder Dewanny Adawlut for 1860.
S. D., N. W., 1860	...	Reports of the Sudder Dewanny Adawlut of the North-west Provinces for 1860.
TAYL. AND BELL.	...	Taylor and Bell's Reports.
W. R.	...	Sutherland's Weekly Reporter.
W. R. Sp., No.	...	" " Full Bench Rulings, 1862-64.

The English and Irish cases have been cited in the usual manner.

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BENGAL SECRETARIAT LIBRARY

THE CODE OF CIVIL PROCEDURE.

ACT NO. XIV OF 1882.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 17th March, 1882.*)*

An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature.

Preamble.

WHEREAS, it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—

PRELIMINARY.

Short title.

1. This Act may be cited as "The Code of Civil Procedure:"

Commencement.

and it shall come into force on the first day of June, 1882.

Local extent.

This section and section 3 extend to the whole of British India. The other sections extend to the whole of British India except the Scheduled Districts as defined in Act No. XIV of 1874.

British India.—Apparently, any new province acquired would become on its acquisition part of British India—*Ouseley* vs. *Plowden*, Boulnois, 161-2.

PART I.

Scheduled Districts, Madras.

I.—IN GANJAM.

(1). The Gumsur Maliahs, including Chokapad.
(2). The Surada Maliahs.

(3). The Chinna Kimedi Maliahs.
(4). The Pedda Kimedi Maliahs.
(5). The Bodaguda Maliahs.
(6). The Surangi Maliahs.
(7). The Parla Kimedi Maliahs.
(8). The Muttás of Koradá and Ronaba (otherwise called Srikarma.)
(9). The Chighatti Maliah.
(10). The Juradá Maliah.
(11). The Jalantra Maliah.
(12). The Mandasa Maliah.
(13). The Budarasinghi Maliah.
(14). The Kuttingia Maliah.

II.—IN VIZAGAPATAM.

(1). The Jeypur Zamíndárí.
(2). Golconda Hills, west of the River Boderu.
(3). The Madugol Maliahs.
(4). The Kasipur Zamíndárí.
(5). The Panchipeuta Maliahs.
(6). Moudemkolla, in the Merangi Zamíndárí.
(7). The Konda Muttá of Belgám.
(8). The Gumma and Konda Muttás of Kurpam.
(9). The Kottam, Rám and Konda Muttás of Pálkonda.

III.—IN THE GODAVARI DISTRICT.

(1). The Bhadráchalam Táluq.
(2). The Rákapilli Táluq.
(3). The Rampá Country.

IV.—IN THE INDIAN OCEAN.

The Laccadive Islands, including Minicoy.

PART II.

Scheduled Districts, Bombay.

I.—The Province of Sindh.
II.—The Panch Maháls.
III.—Aden.
IV.—The Villages belonging to the following Mehwassi Chiefs :—
(1). The Párví of Káthí.
(2). The Párví of Nál.
(3). The Párví of Singpur.
(4). Walwi of Gaohalli.
(5). The Wassáwá of Chikhlí.
(6). The Párví of Nawalpúr.

PART III.

Scheduled Districts, Bengal.

I.—The Jalpáígori and Darjeeling Divisions.
II.—The Hill Tracts of Chittagong.
III.—The Santhál Parganas.
IV.—The Chutiá Nágpur Division.
V.—The Mahúls of Angál and Banki.

PART IV.

Scheduled Districts, North-Western Provinces.

I.—The Jhánsí Division, comprising the Districts of Jhánsí, Jalaun and Lalatpore.

II.—The Province of Kumáon and Garhwál.

III.—The Terai Parganas, comprising Bázpur, Káshípúr, Jaspúr, Rudarpúr, Gadarpúr, Kilpúrí, Nanak-Matthá, and Bílherì.

IV.—In the Mirzapur District :—

(1). The Tappás of Agori Khás and South Kon in the Pargana of Agori.

(2). The Tappá of British Singrauli in the Pargana of Singrauli.

(3). The Tappás of Phulwá, Dudhi and Barhá in the Pargana of Bichipár.

(4). The portion lying to the south of the Kaimor Range.

V.—The Family Domains of the Mahárájá of Benares, comprising the following Parganas :—

Bhadohi and Kheyra Mángror in the Mirzapúr District, Kaswá Rájá in the Benares District.

VI.—The tract of country known as Jaunsar Báwar in the Dehra Dún District.

PART V.

Scheduled Districts, Panjab.

The Districts of Hazára, Pesháwar, Kohát, Bannu, Dera Ismail Khán, Dera Ghazi Khán, Lahaul and Spiti.

PART VI.

Scheduled Districts, Central Provinces.

Chhattisgarh Zamíndáris, viz. :—

1. Khariár.
2. Bindrá Nawagarh.
3. Shahezpúr.
4. Gándai.
5. Silhetí.
6. Barbaspúr.
7. Thákurtolá.
8. Lohárá.
9. Gondardehí.
10. Fingeswar.
11. Pándariá.
12. Pendrá.
13. Mátín.
14. Uprorá.
15. Kendá.
16. Láphá.
17. Chhúri.
18. Korbá.
19. Chapá.
20. Bará Sámbhár.
21. Phúljhar.
22. Kolahirá.
23. Rámpúr.

Chándá Zamíndáris.

1. Ahírí.
2. Ambágarh Chauki.
3. Aundhí.
4. Dhanora.
5. Dúdhmálá.
6. Gewardá.
7. Jhárápárá.
8. Khutgáon.
9. Koráchá.
10. Kotgal.
11. Muramgáon.
12. Pánábáras.
13. Palasgarh.
14. Rángi.
15. Sirsundi.
16. Sousarí.
17. Chándélá.
18. Gilgáon.
19. Páwí Mutándá.
20. Pategáon.

Chhindwárá Jágirdáris.

1. Haraí.
2. Chháter
3. Gorakhghát.
4. Gorpání.
5. Baktágarh.
6. Bardágarh.
7. Pachmarhí.
8. Partábgarh.
9. Almod.
10. Sonpúr.
11. Bariám Págárá.

PART VII.

The Chief Commissionership of Coorg.

PART VIII.

The Chief Commissionership of the Andaman and Nicobar Islands.

PART IX.

The Chief Commissionership of Ajmer and Mairwara.

PART X.

The Chief Commissionership of Assam.

PART XI.

The Hill Tracts of Arakan.

PART XII.

The Pargana of Mánpur

PART XIII.

The Cantonment of Morar.

Interpretation-clause.

"chapter"

"district."

"District Court."

2. In this Act, unless there be something repugnant in the subject or context—

"chapter" means a chapter of this Code:

"district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court: every Court of a grade inferior to that of a District Court and every Court of Small Causes shall, for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court:

"pleader" means every person entitled to appear and plead for another in Court, and includes an advocate, a vakíl and an attorney of a High Court:

"pleader."

"Government Pleader" includes also any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader:

"Government Pleader"

High Court means the highest Civil Court of Appeal in any place.—Clause 11, Section 2, Act I, 1868.

District Court.—See second clause of section 4, post.

Precedence.—The Advocate-General, and Officiating Advocate-General for the time being, are entitled to pre-audience—Bourke, 224.

Advocates have precedence over pleaders—*Englishman, May 21st*, 1872. They can appear and plead on the appellate side of the High Court, but not act; *i.e.*, they are present and represent their clients in the various stages of the litigation at which it is necessary their clients should be present in person or by representative, but they cannot take any steps in the Court or its offices necessary in order that the cause may be properly laid before the Court—*Kali Kumar Roy* vs. *Nobin Chunder Chuckerbutty*, I. L. R., 6 Cal. 585, p. 590. They cannot file an appeal or any other application in the Registrar's Office—*Ram Taruck Barrik*, petitioner, 13 W. R., 60. They may be instructed by clients direct, without the intervention of any pleader—*Gobind Chunder Dutt* vs. *Andrews*, 24 W. R., 15. They cannot enter into any binding contract, sue or be sued for their fees—*Smith* vs. *Guneshee Lall*, 3 Alla., 83; *Achamparambath Cheria* vs. *Ganz*, I. L. R., 3 Mad., 138; it is otherwise with a Barrister who is not an advocate —*Kristna Rowe* vs. *Muttu Kistna*, 4 Mad., 244.

Authority to bind Client.—In England, counsel have complete authority over the suit, the mode of conducting it, and all that is incident to it; such as withdrawing the record, withdrawing a juror, calling no witnesses, and other matters which properly belong to the suit and the management and conduct of the trial—*Swinfen* vs. *Lord Chelmsford*, 29 L. J. (Ex.),397. And where a counsel consents to withdraw a juror, the compromise is binding on the client notwithstanding he may dissent, unless this dissent is brought to the knowledge of the opposite party at the time—*Strauss* vs. *Francis*, L. R., 1 Q. B., 379; and generally a consent order will not be set aside on the ground of mistake effect for reasons sufficient to set aside an agreement—*Attorney General* vs. *Tomline*, 7 Ch. D., 388. But if the consent has been given under a misapprehension, or through a misstatement or want of materials, or if all the information which a counsel ought to have when he gives his consent is not before him, the client is not bound—*Holt* vs. *Jesse*, 3 Ch. D., 177.

In India an agreement by counsel, not to appeal provided the decision be confined to a certain point, is binding on the client—*Moonshee Amir Ali* vs. *Maharani Inderjeet Sing*, 14 Moore, 207.

Parties are bound by the *bonâfide* acts of their pleaders within the scope of their authority, and mere error of judgment affords no valid ground for avoiding them—*Pesch* vs. *Kasee Madud Hossein*, S. D., N. W. 1855, p. 66; *Sheik Burkut Hossein* petitioner, S. D. Sum. Dec., March 29, 1842; *Gour Churn Mookerjee* vs. *Kishen Mohini Dabee*, S. D. Sum. Dec., 19th July 103; but the greatest caution should be exercised by Courts before acting upon vakíl's statements out of the ordinary scope of their authority in the peculiar matter in which they are employed—*Venkataramanna* vs. *Chavela Atchiyamma*, 6 Mad., 127. If a pleader conducting a case makes an admission as to payments made and the state of an account between the parties, it is binding on his client—*Berkley* vs. *Mussamut Chittur Kooar*, 5 Alla., 2; *Kaleekanund Bhattacharjee* vs. *Gireebala Debia*, 10 W. R., 322; *Rajandar Narain Rae* vs. *Bijai Gobind Sing*, 2 Moore, 253; and a record of an admission made by a pleader must be taken to be correct until contradicted by an affidavit of the pleader, or admitted to be wrong by the Judge—*Hur Dyal Singh* vs. *Heera Lall*, 16 W. R., 107; but if a pleader be examined as a witness his evidence is not treated as an admission—*Rash Behary Mookerjee* vs. *Juggadumba Dabee*, 2 Sev., 88. Under a vakalutnama couched in general terms, a vakíl has power to withdraw a suit and bind his client—*Ram Coomar Roy*

vs. *Collector of Beerbhoom*, 5 W. R., 80; but it is not within the ordinary scope of his authority to compromise the suit he is engaged in—*Prem Sookh* vs. *Pirthee Ram*, 2 Agra, 222; *Mussamut Sirdar Begum* vs. *Mussamut Issut Oolnissa*, 2 Alla., 149; or, instead of conducting the defence in the usual way, to bind his client to abide by plaintiff's oath—*Mussamut Hakeem Oonnissa* vs. *Beldeo*, 4 Agra, 361 (but see *Rajender Chunder Newgee* vs. *Mahmud Aymoodeen Moonshee*, W. R., 1864, p. 143); or to give up a portion of the property in dispute—*Ram Kant Chowdry* vs. *Brindabun Chunder Doss*, 16 W. R., 246; *Gour Pershad Doss* vs. *Sookdeb Ram Deb*, 12 W. R., 279; *Sheikh Abdul Sabhan Chowdry* vs. *Shib Kisto Daw*, 8 B.L.R., App. 15; or to pay an exorbitant fee to an attorney or Counsel—*Shamsoonissa Begum* vs. *Carrapiet*, 1 Boulnois, 339; or allow a decree to pass against other property—*Avul Khadar* vs. *Andhuset*, 2 Mad., 423; or to transfer a decree—*Nohur* vs. *Jaffer Hossein*, 2 Alla., 195. See, on this subject, Story on Agency, *King* vs. *Pinsoneault*, L. R., 6 P. C., 245, and the authorities there referred to.

Pleaders and Vakils:—Pleaders of the High Court are entitled to practise in the Calcutta Small Cause Court—Re *Tulsee Doss Seal*, 7 W. R., 228; but not pleaders of Mofussil Courts—*Shushee Bhoosun Bhadooree*, 10 W. R., 82. They can plead in the Criminal Courts on behalf of either prosecutor or prisoner—*Chunder Churn Chatterjee* vs. *Chunder Coomar Ghose*, 14 W. R., Cr., 23.

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The senior pleader present has the entire control of the case; and a junior will not be allowed to argue points in appeal waived by him—*Sreeneebash Roy* vs. *Umbica Churn Roy*, 12 W. R., 375. A pleader using improper expressions during the course of argument should be stopped—In the matter of *Cruise*, 14 W. R. Cr., 53; and if he misconducts himself, the Court may decline to hear him; but it cannot dismiss the case in which he is engaged without trying it on the merits—*Lal Chand Doss* vs. *Shakeer Mahomed*, 6 W. R., 67. No pleader should be called upon to produce his instructions: he is responsible for any statement he may make—*Rajkissen Surmal*, petitioner, S. D. Sum. Dec., Sept. 16, 1846; see evidence, Act of 1872. secs. 149. (*illus.*), 150.

A pleader, appealing to the High Court, cannot certify his own grounds of appeal—*Thakoor Doss Mookerjee* vs. *Ameer Mundul*, 14 W. R., 168. If a pleader, having signed the memorandum of appeal, subsequently refuses to argue the case on the ground of being unprepared, he can be dealt with by the Court for neglect of duty as a pleader—*Buldeo Misser* vs. *Syud Ahmed Hossein*, 15 W. R., 143.

In the High Court he is bound to move for an order as soon as the return is made, and if he does not do so, the case may be taken up in his absence—*Hoosanee Begum* vs. *Dumsee Mahtoon*, 2 W. R., Mis., 51.

A pleader can contract and sue for his fees, and if the terms of the contract are entered in the vakalutnama, oral evidence is not admissible—*Elias* vs. *Sheogholam Doobay*, S. D., N. W., 1860, p. 314—*Shivram Hari* vs. *Arjun*, I. L. R. 5 Bom., 258, but then the vakalutnama must be stamped as a contract—*Nuthoo Lall* vs. *Budree Pershad*, 4 Agra, 286.

There is nothing wrong in contracting for additional remuneration if successful in gaining the suit—*Khajeh Ameen-oodeen* vs. *Mahomed Yaheea*, S. D., N. W., 1860, p. 405; but when a pleader has accepted a vakalutnama for a certain suit, a subsequent agreement to give a sum over and above the usual fees, if successful, is *nudum pactum*—*Ram Chundra Chintaman* vs. *Kalee Raju*, I. L. R., 2 Bom., 362. A contract to be rewarded by a share of the amount in the suit should not be enforced in the North-West, unless the pleader can show its fairness, and that no undue advantage has been taken of his client—*Nuthoo Lall* vs. *Budree Pershad*, 1 Alla., 1; and is prohibited in Madras—*Achamparambath Cheria* vs. *Ganz*, I. L. R., 3 Mad. 138; and if a pleader acts under an engagement constituting himself the client's agent or legal adviser, the onus of showing the fairness of any contract between them will lie on the pleader—*Ranee Usmut Koowar* vs. *Tayler*, 2 W R., 307; 4 W. R., 86; *Fuzeelun Bebee* vs. *Omdah Bebee*, 10 W. R., 469; *Pushong* vs. *Munia Halwani*, 1 B.L.R. (A.C.), 95. In the North-West a pleader receiving a fee for prosecuting or defending a suit is bound to carry it to an end, and to make all applications in the execution department without further fee, and no second fee is allowable for applications in the execution department unless it can be shown that the services of the pleader originally employed were not available—*Takee Ali* vs. *Gool Mahomed Khan*, 1 Alla., 123. The rules relating to pleader's fees in Lower Bengal do not apply to the case of defendants who have a separate interest and consent to a decree. The amount of costs in such case is in the discretion of the Court—*Ramputty Kooer* vs. *Kallee Churn Singh*, 14 W. R., 94. In a suit for fees the cause of action does not arise until the pleader has completely discharged his duty on the conduct of the suit, or his client has dispensed with his services—*Buckapatnam Thatcharlu* vs. *Kajamiya*, 6 Mad., 265. As to fees, see Rules, 5 W. R.

Collector of Thana vs. *Gana Ramji Patil*, 7 Bom. (A.C.), 132 ; *Kisara Rukkumma Rau* vs. *Cripati Vyanna*, 1 Mad., 369. Pleaders cannot be removed except for a criminal offence, misbehaviour or neglect of duty—Petition of *Mahomed Manaff*, 10 W. R., 332 ; *Vamanaji Konera's* case, 1 Bom., 136 ; *Kishoree Lall Sircar*, 14 W. R., 217. See, as to the Procedure in such cases, Act XX of 1865 ; *Gonesh Chunder Gangooly*, 13 W. R., 456 ; in the matter of *Ram Kinkur Sein*, 13 W. R., 67 ; *Komla Kant Deghal*, petitioner, 11 W. R., 127.

It is not expedient for a pleader to purchase the decree of his client—*Goshain Jug Roop Geer* vs. *Chingun Lal*, 2 Alla., 46 ; and he is prohibited from purchasing any actionable claim falling under the jurisdiction of the Court in which he pleads.—Act IV of 1881, Sec. 136 ; nor can he give a percentage on his fees to his client's mukhtar without his client's knowledge, especially before the fee has been earned—In the matter of *Peary Mohun Gooho*, 11 B. L. R., 312. See also *Noor Ahmed*, 17 W. R., 338 ; *Sreenath Roy* (*id.*), 405.

Attorneys and Solicitors.—There is no rule which prevents an attorney from taking security from his client for the payment of costs actually due, with interest thereon at a fair and reasonable rate—*Monohur Doss* vs. *Romanath Law*, I. L. R., 3 Cal., 473 ; but he cannot take security for future costs.—*Forster*, in re, 2 D. F. & J., 105 ; *sed quaere*, if this rule would apply to an attorney doing mofussil business for an attorney in the mofussil—*Shumsoonnissa* vs. *Carrapiet*, Boulnois, 331 ; or agree to be remunerated conditional on success.—*In re* Attorneys Act, 1 ch. Div., 573. But though where an attorney acts regularly as a vakíl in mofussil Courts he may be entitled to the same remuneration as a vakíl, yet where the business done in the mofussil does not fall within the duty of a vakíl, he will be dealt with as an attorney—*Shumsoonissa Begum* vs. *Carrapiet*, Boulnois, 329, 331, 337. An attorney cannot take security for costs and charge 10 per cent. commission on the amount recovered, together with 10 per cent. on the amount of his client's claim—*ibid.* He has no power to compromise a suit after judgment, and his authority only extends to doing his best for the purpose of obtaining the fruits of the judgment for his client—*Lovegrove*, vs. *White*, L.R., 6 C.P., 440; but see *Butler* vs. *Knight*, L.R., 2 Exch., 109. A solicitor has the same lien on translations as on other document and cannot be compelled to produce them when discharged by his client unless on terms which will secure him from fraud—*Bai Kisserbai* vs. *Narranji Walji*, I. L. R., 4 Bom., 353. If, in effecting a mortgage of his client's property he also acts as solicitor for the mortgagee, he cannot claim, as against the latter, a lien on the title deeds or mortgage deed for costs due by the mortgagor—*Mason* and *Taylor*, in re, 10 ch. D., 729; *Sheffield* vs. *Eden*, 10 ch. D.,291; In re *Snell*, 6 ch. D.,107. In England the Courts will make an order to change a solicitor without making any provision for payment of his costs—*Grant* vs. *Holland*, 3 C. P. D., 180 ; it is not certain that this rule would be followed in India—*Ghose* vs. *Ghose*, Boulnois, 340. Where several defendants who have paid money into Court appear by one attorney—they can join and make one application for the payment of it out of Court—*Queen* vs. *Kurballi Mahomed*, Fulton, 328. Declining an attorney's offer to have his bills of costs taxed will not (at least in some cases) bind the client to pay without taxation —*Monohur Doss* vs. *Romanath Law*, I.L.R., 3 Cal., 473. An attorney who discharges himself from his client's service loses his lien over his client's papers.—*In re McCorkindale* I. L. R., 6 Cal., 1 ; and will be prevented from acting for the opposite party in the suit—*Ramlall Agarwallah* vs. *Moonia Bibee*, I.L.R., 6 Cal., 79. An attorney has no lien for costs on papers belonging to an estate which is being administered by the Court.—*Belaney* vs. *French*, L. R., 2 Ch., 913. Where the client is an infant the attorney may in some cases recover his costs as necessaries—*Watkins* vs. *Dhunnoo Baboo*, I. L. R., 7 Cal., 140 ; but see *Steed* vs. *Preece*, L. R., 18 Eq., 192.

"Collector." "Collector" means every officer performing the duties of a Collector of land revenue :

This definition includes Deputy Commissioners in Non-Regulation Provinces.

"decree." "decree" means the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. An order rejecting a plaint, or directing

accounts to be taken, or determining any question mentioned or referred to in section 244, but not specified in section 588, is within this definition : an order specified in section 588 is not within this definition :

"Order." "Order" means the formal expression of any decision of a Civil Court which is not a decree as above defined:

"Judgment." "Judgment" means the statement given by the Judge of the grounds of a decree or order :

Judgment.—When a Court consists of more Judges than one, the memoranda written by the Judges when apart do not amount to a judgment, and a final decision or determination should not be pronounced until the Judges, by conference and discussion of the points, have striven to arrive at an unanimous judgment—*Khelut Chunder Ghose* vs. *Tarrachurn Koondoo Chowdry*, 6 W. R., 269. And the opinions of Judges who have heard the case, but cease to be Judges of the High Court before judgment is pronounced, cannot be treated as judgments, but as mere minutes or memoranda—*Mohamed Akil* vs. *Asadunnissa*, 9 W. R., 1; *Brand* vs. *Hammersmith and City Railway Company*, L. R., 2. Q. B., 223.

Judgment in Rem.—It is extremely doubtful whether there exists in India (exclusive of the particular jurisdictions which are exercised by the Courts in matters of probate and the like—Evidence Act, Sec. 41; and those which, in case of war, might be exercised in matters of prize) any ordinary Court capable of giving what can be technically called a judgment *in rem*—*Jogendur Deb Roy* vs. *Funinder Deb Roy Kut*, 17 W.R., 104: the Mofussil Courts cannot—*Kanhya Loll* vs. *Radha Churn*, 7 W. R., 338; see, also, *Gungadhur Roy* vs. *Umasoondery Dossee*, 7 W. R., 347; *Yarakalamma* vs. *Ankala Naramma*, 2 Mad., 276; *Kattama Nauchear* vs. *The Raja of Shivagangah*, 2, W. R., P. C., 31; their judgments are only judgments *inter partes*, and do not conclude any persons but the plaintiffs and defendants, or their representatives, on the same matter—*Balaji Vishvanath Joshi* vs. *Dharma*, 2 Bom., 363; *Ramnarain Dass* vs. *Pohup Singh*, S. D., N. W., 1853. p. 622, and a Judge should not allow his judgment in one case to govern his decision in another (where either party is different) without the consent of both, though the subject matter of the dispute is similar, and the evidence is similar in character—*Sorendronath Roy* vs. *Purmanund Ghose*, 15 W. R., 342. Such judgments do not conclude other parties, and should not be admitted in evidence against them—*Gujju Lall* vs. *Fatteh Lall*, I. L. R, 6 Cal., 171. If the case has been dismissed, it is said that no expression adverse to the defendant can affect his rights in any future litigation between the same parties—*Chowdry Mahomed Momin* vs. *Lutafut Hossein*, 13 W. R., 239; but that is a mistake—*Niamut Khan* vs. *Phadu Baldia*, I. L. R., 6 Cal., 319.

Decree.—A decree differs from an order; the former expresses the result of the Judicial proceeding, the latter is apparently confined to such orders as are given in the course of the proceedings, and do not finally dispose of the matter. Under section 15 of the Letters Patent for 1865, an appeal lies from the judgment of one Judge, and from the judgment of two or more Judges of the High Court equally divided in opinion, and it has been held that, comparing that section with the Procedure Code, the word "judgment" means a decision *determining* some right or liability—*The Justices of the Peace in Calcutta* vs. *The Oriental Gas Company*, 8 B.L.R., 433. In this case, Couch, C.J., said :—"A decision of the High Court of Madras was also referred to, in which it was held that the refusal of a Judge to give leave to institute a suit on the Original Side of the Court under clause 12 of the Charter was a judgment, and as such appealable under clause 15—*DeSouza* vs. *Coles*, 3 Mad., 384. The Court there said that the word 'judgment' in clause 15 could not 'be limited to the final judgment in a suit at all, but must be held to have the more general meaning of any decision or determination affecting the right or the interest of any suitor or applicant.' And again, 'where the language giving the appeal is so general in its terms as that contained in the 15th clause of the Charter, it is, we think, impossible to prescribe any limits to the right to appeal founded on the nature of the order or decree appealed from.' We are not prepared to go to this extent.....We think that 'judgment,' in clause 15, means a decision which affects the merits of the question between the parties by determin-

ing some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined. Both classes are provided for in clauses 39 and 41 of the Charter. An order, such as that before us, which only authorizes a proceeding to be taken for the determination of a question between the parties, cannot be considered a judgment." So in *Reasut Hossein* vs. *Hadjee Abdoollah*, L. R., 3 In. Ap., 221, their Lordships of the Privy Council held as follows :—" Their Lordships are disposed to think that an order, rejecting an application for registration under the Act of 1871, must be taken to be so far in the nature of a *decree* within the meaning of Act VIII of 1859, as to fall within the operation of the sections in question" (there on review). " The proceeding may be what is technically called in India a miscellaneous proceeding, or it may be a summary suit; but the order made upon it is, so far as concerns the matter in dispute, final between the parties. Whether it is subject to appeal or not, it is, so far as the Court pronouncing it is concerned, a final order of adjudication between the parties."

By section 647, this Code applies to all miscellaneous proceedings, and it would, therefore, appear that any order in a judicial proceeding, which finally adjudicates between the parties, is a decree—*Saltan Ackene Saheb* vs. *Shaikh Bara*, I. L. R., 4 Mad., 295.

What amounts to a Decree.—A decree does not become 'final' until the time for the last appeal allowed has expired, or where appealed from, until the decision of the ultimate Court of appeal has been given—*Shaik Ewaz* vs. *Mokuna Bibi* I.L.R., 1 Alla. 132; *The Justices of the Peace for Calcutta* vs. *The Oriental Gas Company*, 8 B.L.R., 433 ; 17 W. R., 364; even on the ground that it is insufficiently stamped—*Ajoodhya Pershad* vs. *Gunga Pershad*, 6 C. L. R., 567; I. L. R., 6 Cal., 249. See, however, *Huribal Hossein* vs. *Mahomed Riza*, I.L.R. 8 Cal., 192. An order directing money to be paid out of Court in execution—*Biswunath Chundra* vs. *Khantoman Dasi*, 6 B.L.R., 747; an order refusing to entertain a suit—*Shaikh Golam Ehya* vs. *Lalla Doorga Dyal*, 3 W. R., Act X, 17 ; an order refusing leave under clause 12 of the Letters Patent—*Hadjee Ismail* vs. *Hadjee Mahomed*, 13 B.L.R., 91 ; an order under the Administrator-General's Act, ascertaining the commission payable to that officer, and passed by a single Judge of the High Court—*Soma Sundaram Chatti* vs. *The Administrator-General*, I.L.R., 1 Mad., 148; an order passed in a suit referring it to the Commissioner to take the accounts between the parties—*Hirji Jina* vs. *Narran Mulji*, 12 Bom., 132 ; but see *Rustomji Burjorji* vs. *Kessowji Naik*, I.L.R., 3 Bom., 161 ; an order rejecting an application for execution in the Privy Council department—*Kally Soondery Deha* vs. *Hurish Chunder Chowdhry*, I.L.R., 6 Cal., 594 ; an order under s. 37, Act VIII of 1869 (B. C.)—*Brojendra Coomar Roy* vs. *Krisna Coomar Ghose*, I.L.R., 7 Cal., 684 ; an order in execution disallowing the objections raised by a judgment-debtor to execution being taken out by an assignee of the decree—*Murlidhar* vs. *Passalam Das*, I.L.R., 2 Alla., 91 ; an order directing the removal of certain buildings as being included in the decree—*Uda Bejam* vs. *Imamud-Din*, I.L.R., 2 Alla., 74 ; and an order directing minors to be handed over to a guardian—*Kristo Kissor Neoghy* vs. *Padomonye Dossee*, 2 Cal. R., 583, are orders amounting to decrees—See also *Rostomji Ramjiji* vs. *Kessowji Naik*, I. L. R., 3 Bom., 161.

Order not Decree.—Admitting a plaint—*The Justices of the Peace for Calcutta* vs. *Oriental Gas Co.*, 8 Ben., 433 ; 17 W.R., 364. Order refusing to restrain proceedings in a suit on the ground that the costs of a previous suit had not been paid—*id.*; *Chetto Sheikh* vs. *Kazee Muzzur Hossein*, Hyde, 212. Order, directing the addition of a party to a suit—*Kumara Upendra Krishna Deb Bahadoor* vs. *Nobin Krishna Bose*, 3 Ben., 113. A decision given upon the settlement of issues, that a certain hibbanama relied upon by the defendants was invalid—*Ebrahim* vs. *Fuchhrunissa Begum*, I.L.R., 4 Cal., 531; 3 Cal. L. R., 311. An order merely directing an award should be filed—*Ramadher* vs. *Mahesh*, I. L. R., 2 Alla., 471. An order dismissing a review of judgment passed by the senior Judge, the junior disagreeing—*Raku Bibi* vs. *Khaja Mahomed Musa Khan*, 4 B.L.R., 10. An order for inspection of documents—*Sonbai* vs. *Ahmedbhai*, 9 Bom., 398. An order in the Privy Council Department granting a certificate that a case is a fit case for an appeal to Her Majesty in Council—*Mowla Buksh* vs. *Kissen Pertab Shahi*, I. L. R., 1 Cal., 112, or refusing it—*Manly* vs. *Patterson*, I. L. R., 7 Cal., 339. See also on this point the New York Procedure Code (11th ed.), pp. 354, 496, 627.

Judicial Proceeding.—This term has not been defined. In the Criminal Procedure Code, section 4, it is described as meaning "any proceeding in the course of which evidence may be taken, or in which any judgment, sentences, or final order is passed on recorded evidence.

"Judge."

"Judge" means the presiding officer of a Court:

Judge.—Compare this definition with that given in section 19 of the Penal Code. An additional Judge comes within the meaning of Act VIII of 1869 (B.C.), section 112, and an appeal does not lie from his decision in cases of the nature described in that section any more than from a District Judge—*Brojo Misser* vs. *Mussamut Ahladee Misrain*, 21 W. R., 320.

"judgment-debtor."

"judgment-debtor" means any person against whom a decree or order has been made:

"decree-holder."

"decree-holder" means any person in whose favour a decree or any order capable of execution has been made, and includes any person to whom such decree or order is transferred:

"written."

"written" includes printed and lithographed, and "writing" includes print and lithograph:

"signed."

"signed" includes marked, when the person making the mark is unable to write his name; it also includes stamped with the name of the person referred to:

"foreign Court."

"foreign Court" means a Court situate beyond the limits of British India and not having authority in British India nor established by the Governor-General in Council:

"foreign judgment."

"foreign judgment" means the judgment of a foreign Court:

This section applies to H. C. and M. S. C. C.

The definition of foreign Court does not include the Privy Council, as it possesses authority in British India. It does include all other Courts in England; but see 13 Geo. III. c. 63, and the observations of their Lordships of the Privy Council in *Madras Ry. Co.* vs. *Zemindar of Cawa* (L. R. 1 Ind. App., at p. 385).

"public officer."

"public officer" means a person falling under any of the following descriptions (namely):—

Every Judge;

Every covenanted servant of Her Majesty;

Every commissioned officer in the military or naval forces of Her Majesty while serving under Government;

Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties;

Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government, or to make any survey, assessment or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report on, any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty.

The Official Trustee of Bengal is a public officer—*Saheb Zadee Shahun Shah Begum* vs. *Fergusson*, I. L. R., 7 Cal., 499.

A supernumerary peon, appointed by the Board of Revenue under section 6, Act V, 1863 (B.C.) is a public officer—*Queen* vs. *Ram Kisto Dass*, 16 W. R. Cr. R., 27. So are convict warders appointed under the jail rules (403A), whose duty it is to keep prisoners in confinement—*Queen* vs. *Kalachand Moitree*, 7 W. R. Cr. R., 99. A Naib Nazir is a public officer—*Queen* vs. *Mahmood Hossein*, 2 Alla., 298. So, apparently, is a putwari—*Queen* vs. *Mudsooddeen*, 2 Alla., 148.

The definition of public officer given in this Code follows closely the definition of public servant in the Penal Code. The following clauses have been omitted :

" *Tenth.* Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, or to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town, or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town, or district.

" *Illustration.*

" A Municipal Commissioner is a public servant.

" *Explanation* 1. Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

" *Explanation* 2. Wherever the words " public servant" occur they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation."

It would, therefore, appear that neither a Municipal Commissioner, nor an Engineer, who receives and pays away municipal moneys is a public officer, although they are both public servants—*R.* vs. *Naritamram Uttaram* ; 6 Bom. R., Cr. Ca. 64.

Court of Justice.—No definition is given in this Code. In the Penal Code it is defined as follows :—

" The words ' Court of Justice' denote a judge who is empowered by law to act judicially alone or a body of judges which is empowered by law to act judicially as a body when such judge or body of judges is acting judicially.

" *Illustration.*"

" Punchayet, acting under Regulation VII of 1816 of the Madras Code having power to try and determine suits, is a Court of Justice."

" Government."

And in any part of British India in which this Code operates, " Government" includes the Government of India as well as the Local Government.

By section 2, Act I of 1868, clauses 8, 9 and 10, " British India" shall mean the territories for the time being vested in Her Majesty by the statute 21 & 22 Vic., Cap. 116 (*An Act for the better Government of India*), other than the settlement of Prince of Wales' Island, Singapore, Malacca.

"Government of India" shall denote the Governor-General of India in Council or, during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone, as regards the powers which may be lawfully exercised by him or them respectively.

"Local Government" shall mean the person authorised by law to administer executive Government in the part of British India in which the Act containing such expression shall operate and shall include a Chief Commissioner.

Enactments repealed.

3. The enactments specified in the first schedule hereto annexed are hereby repealed to the extent mentioned in the third column thereof. But all notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed and forms framed under any such enactment, shall, so far as they are consistent with this Code, be deemed to be respectively published, made, appointed, filed, prescribed and framed hereunder.

References in previous Acts

And when in any Act, Regulation, or notification passed or issued prior to the day on which this Code comes into force, reference is made to Act No. VIII of 1859, Act No. XXIII of 1861, or the "Code of Civil Procedure," or to Act No. X of 1877, or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof.

Saving of procedure in suits instituted before 1st June 1882.

Save as provided by section 99A nothing herein contained shall affect any proceedings prior to decree in any suit instituted or appeal presented before the first day of June, 1882, or any proceedings after decree that may have been commenced and were still pending at that date.

Appeal pending on 29th July 1879.

Every appeal pending on the twenty-ninth day of July, 1879, which would have lain if this Code had been in force on the date of its presentation, shall be heard and determined as if this Code had been in force on such date; and every order passed before the same day, purporting to transfer a case to a Collector under Act No. X of 1877, section 320, and every notification published before the same day, purporting to be issued under Act No. X of 1877, section 360, shall be deemed to have been respectively passed and issued in accordance with law.

This section applies to H. C., P. S. C. C., and M. S. C. C.

As to the effect of this saving clause see *Rustomji Burjoji* vs. *Kersowji Naik*, I. L. R., 3 Bom., 161.

The proceedings were held to be governed by this Code in *Elahi Buksh* vs. *Maruchow*, I.L.R., 4 Cal., 825; 3 C.L.R., 593; and by Act VIII of 1859 in *Chinto Joshi* vs. *Krishnaji Narayan*, I.L.R., 3 Bom., 214; *Narandas* vs. *Bai Mancha*, I.L.R., 3 Bom. 217; *Vidyaram* vs. *Chandra Shikaram*, I.L.R., 4 Bom., 163. See *Runjit Singh* vs. *Mehcrban*

Kooer; I.L.R., 3 Cal., 663; 2 C.L.R., 391; *Thakur Prasad* vs. *Ahsan Ali*, I.L.R., 1 Alla., 668; *Obhoy Churn Coondoo* vs. *Golam Ali*, I.L.R., 7 Cal., 413; *Uda Begam* vs. *Imamudin*, I.L.R., 2 Alla., 74; *Syad Nadir Hossein* vs. *Bissen Chund Bassarat*, 3 C.L.R., 437.

Enactments repealed.—This will not affect proceedings commenced before the Code comes into force. See Act I, 1868, sec. 6, and the following decisions thereon, *Syud Mahomed Hossein* vs. *Hadji Abdullah*, I.L.R., 3 Cal., 727; *Ratanchand Srichand* vs. *Hanmantrav Shirbakas*, 6 Bom., A. C. J. 166; *Ashootosh Dutt* vs. *Doorga Charn Chatterjee*, I.L.R., 6 Cal., at p 508.

References to previous Acts.—See Act XIX, 1873, sections 176, 216.

Saving of certain Acts affecting Oudh, Panjab, Central Provinces and Burmah.

4. Save as provided in the second paragraph of section 3, nothing herein contained shall be deemed to affect the following enactments (namely) :—

The Central Provinces Courts Act, 1865 :

The Burmah Courts Act, 1875 :

The Panjáb Courts Act, 1877 :

The Oudh Civil Courts Act, 1879 :

or any law heretofore or hereafter passed under the Indian Councils Act, 1861, by a Governor or a Lieutenant-Governor in Council, prescribing a special procedure for suits between landholders and their tenants or agents.

or any law heretofore or hereafter passed under the Indian Councils Act, 1861, by a Governor or a Lieutenant-Governor in Council, providing for the partition of immoveable property.

And where under any of the said Acts concurrent civil jurisdiction is given to the Commissioner and the Deputy Commissioner, the Local Government may declare which of such officers shall, for the purposes of this Code, be deemed to be the District Court.

This Act will not apply to rent suits in Lower Bengal so as to interfere with any procedure laid down in Act VIII, (B.C.) of 1869.

Sections extending to Mofussil Small Cause Courts.

5. The chapters and sections of this Code specified in the second schedule hereto annexed extend (so far as they are applicable) to Courts of Small Causes constituted under Act No. XI of 1865, and to all other Courts (other than the Courts of Small Causes in the towns of Calcutta, Madras and Bombay) exercising the jurisdiction of a Court of Small Causes. The other chapters and sections of this Code do not extend to such Courts.

Act XI of 1865, refers to Mofussil Small Cause Courts only. For how far the Code extends to the Presidency Small Cause Courts, see *infra*, sec. 8.

Saving of Jurisdiction and procedure—

(*a*) of Military Courts of Request;

6. Nothing in this Code affects the jurisdiction or procedure—

(*a*) of Military Courts of Request;

(*b*) of officers appointed to try small suits in Bombay;

(*b*) of a single officer duly appointed in the Presidency of Bombay to try small suits in military bázárs at cantonments and stations occupied by the troops of that Presidency; or

(*c*) of Village Munsifs and village Panchayats in Madras:

(*c*) of Village Munsifs or Village Panchâyats under the provisions of the Madras Code;

(*d*) of Recorder of Rangoon sitting as an Insolvent Court.

(*d*) of the Recorder of Rangoon sitting as an Insolvent Court in Rangoon, Maulmain, Akyab or Bassein;

or shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

Saving of certain Bombay laws.

7. With respect to—

(*a*) the jurisdiction exercised by certain jágírdárs and other authorities invested with powers under the provisions of Bombay Regulation XIII of 1830 and Act No. XV of 1840 in the cases therein mentioned, and

(*b*) cases of the nature defined in the enactments specified in the third schedule hereto annexed,

the procedure in such cases and in the appeals to the Civil Courts allowed therein, shall be according to the rules laid down in this Code, except where those rules are inconsistent with any specific provisions contained in the enactments mentioned or referred to in this section.

Presidency Small Cause Courts.

8. Save as provided in sections, 3, 25, 86, 223, 225, 386, and chapter XXXIX, this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

But the Local Government may, by notification published in the official Gazette, extend to any such Court this Code or any part thereof, except so far as relates to appeals and reviews of judgment.

See *Calcutta Gazette*, October 30, 1878, p. 1173.

Division of Code.

9. This Code is divided into ten Parts, as follows:—

The first Part: Suits in General.
The second Part: Incidental Proceedings.

The third Part:	Suits in particular Cases.
The fourth Part:	Provisional Remedies.
The fifth Part:	Special Proceedings.
The sixth Part:	Appeals.
The seventh Part:	Reference to and Revision by the High Court.
The eighth Part:	Review of Judgment.
The ninth Part:	Special Rules relating to the Chartered High Courts.
The tenth Part:	Certain Miscellaneous Matters.

PART I.

OF SUITS IN GENERAL.

CHAPTER I.

OF THE JURISDICTION OF THE COURTS AND *Res Judicata.*

No person exempt from jurisdiction by reason of descent or place of birth.

10. No person shall, by reason of his descent or place of birth, be in any civil proceeding exempted from the jurisdiction of any of the Courts.

This section applies to H. C. and M. S. C. C.

This section does not affect special legislation, such as that which has been provided for the care of the persons and property of minors—Re *Shannon*, 2 Alla., 79.

Courts to try all civil suits unless specially barred.

11. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

This section applies to H. C.

A suit will not lie in the *Calcutta* High Court on a decree of the Small Cause Court—*Moonshee Golam Arub* vs. *Curreem Bux*, I. L. R. 6 Cal., 294; 4 C. L. R., 477; it will lie in Bombay—*Fakirappa* vs. *Pandurangapa*, I. L. R. 6 Bom., 7. In Calcutta, a suit may be brought on a decree of the High Court—*Attermoney Dossee* vs. *Hurry Doss Dutt*, I. L. R. 7 Cal., 74; but no such suit will lie in Bombay—see I. L. R. 6 Bom., 7. But a suit was held to lie in the Civil Court on a decree obtained in the Court of the Agent for Sirdars against defendant's father, the decree which was for payment of a sum of money by instalments having become incapable of execution on the death of defendant's father, defendant himself not being a Sirdar—*Sakharam Dikshit* vs. *Ganesh Sathe*, I.L.R., 3 Bom., 193.

A suit will not lie to set aside a certificate granted under Act XXVII, 1860—*Roghoobur Dyal Singh* vs. *Ram Narain Koyla*, 22 W. R., 812; though one for declaration of title to be used as a reason for asking the certificate to be withdrawn is

admissible—*Russick Chunder Mohunt* vs. *Ram Lall Shaha*, 22 W. R., 301. So a regular suit will not lie to set aside an order granting probate of a will, the grant must be contested by an application to revoke in the Court of Probate—*Malyho* vs. *Williams*, 2 Alla., 268, unless for fraud or want of jurisdiction—*Komollochun Dutt* vs. *Nilrutton Mundle*, I.L.R., 4 Cal., 360; 4 C.L.R., 175; and even a judgment-creditor who has attached—*Umanath Mookhopadhya* vs. *Nilmoney Sing*, I.L.R., 6 Cal., 429, or a mortgagee of the rent of keri—*Nobeen Chunder Sil* vs. *Bhooboo Soonduri Dabee*, I.L.R., 6 Cal., 460, may contest the grant; but no person can do so who has taken part in the probate proceedings, his remedy is, possibly, review of judgment—*Soorji Jivandas*, petitioner, I.L.R., 5 Bom., 638; but a decision as to the validity of a will in a suit under Act XXVII, 1860, will not be a bar between the same parties—*Annund Chunder Mitter* vs. *Banee Madhub Mitter*, 11 W. R., 127.

A decree or judgment must be considered valid until reversed or superseded. Hence, money recovered under a decree or judgment cannot be recovered back in a regular suit so long as the judgment or decree under which it was recovered remains in force—*Shama Purshad Roy Chowdery* vs. *Hurro Purshad Roy Chowdery*, 10 Moore, 211; and where money is deposited in an action under an order of Court, a separate suit will not lie for its recovery—*Vaughan* vs. *Demetrius Elias*, 7 S. D. A. Sel., 175. A suit to recover money paid to a zemindar under a Revenue Court's decree after the same amount had been paid to his gomashta will not lie—*Srimati Soudamini Dassi* vs. *Srimati Thakomani Debi*, 3 B. L. R. App., 114.

But a suit will lie for the recovery of damages for cutting and carrying crops from certain land of which the defendant had obtained possession under a decree which was set aside on appeal—*Shurnomoye* vs. *Sukar*, I. L. R., 4 Cal., 625. And when successive decrees for rent have been obtained, each depending on the first which is afterwards reversed on appeal, a suit will lie to recover the excess money paid under the other decrees—*Jogesh Chunder Dutt* vs. *Kali Churn Dutt*, I. L. R., 3 Cal., 30. A suit will lie to set aside a decree on the ground of fraud—*Golab Chunder Baboo* vs. *Prosunno Coomaree Dabee*, 20 W. R., 86; but not if the plaintiff urged fraud in the first Court after the decree had been passed and failing did not appeal, though an appeal was allowed—*Rajkissen Mookerjee* vs. *Modhoosudan Mundul*, 17 W.R., 413.

A suit will not lie for right of way over land taken up for public purposes—In the matter of *H. B Fenwick*, 6 B. L. R. App., 47; 14 W. R., Cr., 72. But a suit will lie to set aside the order of a Magistrate passed under section 518, Act X, 1872—*Kedarnath* vs. *Rughonath*, 6 Alla., 104; *Gopi Mohun Mullick* vs. *Jaramoni*, I. L. R., 5 Cal., 7; but not to set aside an order declaring a road public—*Ujulmayi Dasi* vs. *Neogi*, 4 B. L. R., (F. B.), 24. But such orders do not prevent the person against whom the order has been given to show in a suit that it is his own property—*Laljí Ukheda* vs. *Jowba*, 8 Bom., 94; *Queen* vs. *Hutchins*, 6 Q. B. Div., 300.

Act XIII of 1848 operates in certain cases to give to a survey award the full effect of a decree of a Civil Court by taking away from the Courts the power of entertaining any suit for contesting the justice of such award after a limited time—*Mokund Mooraree Biswas* vs. *Wooma Churn Mookerjee*, 23, W.R., 173.

The Code of Civil Procedure, except so far as its provisions enact rules for appeals from subordinate Courts, does not apply to proceedings under the Military Courts of Requests Act, Act XI of 1841—*Gunsam oss* vs. *Mooltan Mull*, 2 Alla., 192. Suits regarding minors, under Act IX of 1861, are cognizable by principle Civil Courts of Districts; a Moonsiff has no jurisdiction to try them—*Kristo Chunder Acharjee* vs. *Kashee Thakooranee*, 23 W. R., 340.

A suit involving a separation and partition, with a separation of revenue upon it from the remainder of the revenue-paying estate will not lie in a Civil Court—*Ruttun Monee Dutt* vs. *Brojo Mohun Dutt*, 22 W.R., 333; *Kalee Mohun Sen* vs. *Ram Soonder Sen*, 24 W. R., 213; see also *Mussamut Bhurton Koeree* vs. *Tangore Singh*, 18 W. R., 147. A suit by the owner of a fractional share of an undivided estate, for a *kubooleut*, will lie—*Indur Chunder Doogur* vs. *Bindabun Beharee*, 15 W. R., (F. B.,) 21. The purchaser of a share of undivided *lakheraj* estate has a right to apply for a separation of his share from those of the other shareholders. In such a case the Collector could not make the butwara under the provisions of Regulation XIX of 1814; the Civil Court alone would have jurisdiction, and the partition must be made by the Civil Court either by the Moonsiff or by an officer of the Court—*Futteh Bahadoor* vs. *Jankee Bibee*, 13 W. R. 74.

Where an estate is seized by the Crown by its right of conquest, and not by virtue of any legal title, such seizure must be regarded as an act of State, and is not liable to be questioned in a Municipal Court—*Sirdar Bhagwan Singh* vs. *Secretary*

of State for India in Council, L. R., 2 Ind. App., 38; see *Forester* vs. *Secretary of State for India*, L. R. I. A. Sup. vol., 10.

Ministerial and Judicial Acts.—What is done by an officer ministerially may be questioned; but if he acts judicially, then his decision is binding and conclusive, unless an appeal is given—*R.* vs. *Collins*, 2 Q. B. D., 35. The removal of an obstruction by a Magistrate, in exercise of the powers given to him by Act VI of 1868 (B. C.), section K, clause 1, is not a judicial, but an executive or ministerial act, and even the circumstance that a fine is imposed on the person who sets up the obstruction does not protect the Magistrate, under Act XVIII of 1850, from an action being brought to try the question of such person's right to have the obstruction there—*Baboo Chunder Narain Singh* vs. *Brojo Bullub Gooie*, 21 W. R., 391.

The High Court of Madras has jurisdiction to try original suits against Revenue Officers for acts *ultra vires* done in their official capacity—*Collector of Sea Customs* vs. *Chithambaram*, I.L.R., 1 Mad., 89.

Appointments and Pension.—As to how far a suit will lie for a pension, &c. see—*Khando Narayan Kulkarni* vs. *Apaji Ludasio Kulkarni*, I. L. R., 2 Bom., 370; *Chinto Alaji Kulkarut* vs. *Sakhshmibat, Bom Sakharam Aulaji*, I. L. R., 2 Bom., 375; *Gopal Hanmat* vs. *Sakharam Govind*, I. L. R., 4 Bom., 254; *Vasudev Vithal Samant* vs. *Ram Chandra Gopal Samant*, I. L. R., 6 Bom., 129; and as to pensions, *Vasudev Sadashiv Modak* vs. *Collector of Ratnagiri*, L. R., 4 Ind. App. 119; *Parudas Rajaji* vs. *Mohram Kalyandas*, I. L. R., 1 Bom., 206; and *Shahzadee Hasara Begum* vs. *Collector of Burdwan*, 23 W. R., 378, overruled by *Maharaval Mohansingji Jay Singji* vs. *The Government of Bombay*, L. R., 8 Ind. App. 77. A suit for a share of a watari will lie—*Moheyodin* vs. *Chotibibi*, I.L.R., 5 Bom., 578; *Syed Mahomed Isaack* vs. *Ausoorunnissal*, I. L. R. 4 Mad., 341.

Champerty and Maintenance.—In order to impeach a contract, it must have the qualities attributed to champerty or maintenance in English law—*Fischer* vs. *Kamala Naicker*, 8 Moore, 70; *Ramroo Khanderao* vs. *Govind*, 6 Bom., 63; *Pitchakulli* vs. *Kamala*, 1 Mad., 153; and a fair agreement to supply funds, in consideration of a share of the property, if recovered is not *per se* opposed to public policy; but if the agreement is extortionate, or for gambling in litigation, or injuring or oppressing others, by abetting unrighteous litigation—*Ram Coomar Coondoo* vs. *Chunder Cant Mookerjee*, L. R., 2 App. Cal., 186; I. L. R., 2 Cal., 233—*Damodhar Moohabji* vs. *Kahandas*, 8 Bom., 1; or if the litigation is merely got up for the purposes of spoil, and disturbing the peace of families, the Courts would act wrongly in allowing strangers to interfere in family affairs on agreement to be remunerated by part of the property—*Chedumbara Chetty* vs. *Naiker*, L.R., 1 Ind. App., 241; *Mullajaffarji* vs. *Yacali*, 7 Mad., 128.

A suit will not lie for defending a possessory action under Act V, 1864 (Bom.)—*Jalau Punja* vs. *Khodajaora*, 8 Bom., 29; nor for costs incurred in resisting a claim under sections 278, 280, 281, of this Code—Ref. case No. 5 of 1867, 3 Mad., 341. See note on section 2, "pleader" *Ante*.

No Cause of Action—Agreement—No action will lie to recover the rent of lodgings knowingly let to a prostitute to carry on her vocation there—*Gaurinath Mookerjee* vs. *Madhumuni Peshakar*, 9 B. L. R., App. 37; 18 W. R., 445; though prostitution is recognized and legalized by the Hindu law—*Chalakonda Alasani* vs. *Chalakonda Ratna Chalam*, 2 Mad., 56; nor to recover money lent by a judge to a native officer on his establishment in contravention of Regulation XXXVIII of 1793—*Ooday Chund Chatoorjea* vs. *Palmer & Co.*, 3 S. D. A., Sel., 18. Nor on an agreement by which a person is partially restrained from exercising a lawful profession, trade or business of any kind—*Madhub Chunder Poramanick* vs. *Rajcoomar Doss*, 14, B. L. R., 76; *Oakes* vs. *Jackson*, I. L. R., 1 Mad., 134; but see illustration (*b.*), section 74, Act IX, 1872. Nor on an agreement not to carry on a trade with the assistance of others than the defendant's own caste—*Vaithelinga* vs. *Saminada*, I. L. R., 2 Mad., 44.

No suit will be on a contract entered into by Hindus by which it is agreed that, on the happening of a certain event, a marriage is to become null and void—*Sitaram* vs. *Mussamut Aheeree Heeranee*, 11 B. L. R., 129. But a contract by a Muhammadan with his first wife not to marry a second—*Hurron* vs. *Khyroollah*, Fulton 361; or granting her the power of divorce if he either married again or if he violated any condition of the marriage contract is not illegal—*Hamidoolla* vs. *Fazunnessa*, I. L. R., 8 Cal., 327. See however, Futawa Alimgiri, vol. 1, p. 384; Fatawa Kazikhan, vol. 1 p. 278. Nor will a suit for specific performance of an agreement to marry lie—*Umed Kika* vs. *Nagindas Narotamdas*, 7 Bom.,

122; *Sheikh Bhugan* vs. *Sheikh Rumjan*, 24 W. R., 380; nor on a contract affecting the course of justice, such as to obtain the release of a *badmash* by killing the Police Officer in whose charge he was—*Prolima Aurat* vs. *Dukhia Sircar*, 9 B. L. R. App. 38; nor to hush up a case and suppress a criminal prosecution for a consideration—*Jeetoo Mahato* vs. *Moneeram Mahato*, 17 W. R., 84; *Kandan Chetti* vs. *Coorjee Seit*, 2 Mad., 187; (otherwise if the contract were to forego a prosecution in a case in which, though a compromise could not be legally effected, it had been allowed by the Magistrate—*Sheikh Nubbee Buksh* vs. *Mussamut Bibee Hingon*, 8 W. R., 412; nor to compound criminal proceedings in a foreign country for an offence committed there, and the law of the country permitted the transaction—*Subraya Pillai* vs. *Subraya Mudali*, 4 Mad., 14). Nor can a contract be enforced for or about any matter prohibited or made unlawful by statute; thus where certain farmers agreed to pay over and above the jummas such sums as would be realized under the head of *Zabita batta* and were sued for these sums by the zemindar, it was held that the stipulation was illegal and opposed to section 3, Regulation V, 1812, and the suit was dismissed—*Radha Mohun Serma* vs. *Gunga Pershad Chukerbutty*, 7 S. D. A. Sel., 166; so an agreement to pay the *Paroti* collected from the village has been declared illegal under section 10, Act X, 1859 - *Kamala Kant Ghose* vs. *Kalu Mahomed Mandal*, 3 B. L. R., 44; 11 W. R., 395. Nor will a suit lie against a Tahsildar to account for money "exacted" in excess of the rent; otherwise if the payment had been made voluntarily—*Nobin Chunder Roy* vs. *Gooroo Gobind*, 14 W. R., 447; 25 W. R., 8. But where the *talab beshi* has been paid voluntarily for several years and has been incorporated in the rent and the two payments form the subject of one receipt, the cess is not illegal and the ryot must pay it—*Serajgunge Jute Co.* vs. *Torabdee Akhoond*, 25 W. R., 252; *Sonnum Sookul* vs. *Shaikh Elahee Buksh*, 7 W. R., 453. In the North-West it has been held that a suit to collect cesses not authorized by Regulation VII, 1822, is not maintainable—*Khyrat Ali* vs. *Mahomed Yaseen Khan*, 1 Agra, 207; *Bisharut Ali* vs. *Seetul Misser*, 1 Alla., 37, though a suit lies by a zemindar to establish his right to a cess and to question the validity of a settlement officer's refusal to record it—*Mahomed Ali Khan* vs. *Oomrao Singh*, 2 Alla., 425.

No suit will lie on a contract having the qualities attributed to champerty or maintenance in English law, something against good policy and justice, tending to promote unnecessary litigation and in a legal sense immoral, and to the constitution of which a bad motive is in the same sense necessary—*Fischer* vs. *Kamala Naicker*, 8 Moore, 170; and not *bonâ fide* entered into merely to obtain an interest in the litigation, but an unfair, illegitimate transaction got up for the purpose merely of spoil or of litigation, disturbing the peace of families, and carried on from a corrupt and proper motive—*Chedambara Chetty* vs. *Renga Krishna Muthu Vira Pacheiya Naickar*, L. R., 1 Ind. App., 241; 22 W. R., 148. R, the owner of certain property having died, and his immediate heirs having subsequently died without issue, A, as the next-of-kin, attempted to take the property of the deceased, and, being opposed, brought a suit under Act XIX of 1841, and subsequently alienated a moiety of his right, title and interest valued at Rs. 75,000 to B, in consideration of Rs. 50 in cash, his trouble and assistance in managing and conducting the suit and defraying the expenses of it. The suit was dismissed. Afterwards K sold the interest he had acquired to T for Rs. 1,700 advanced by the latter and expended in the proceedings, valuing the interest sold at Rs. 2,18,000; T brought a suit against the person in possession and N: *Held*, the contract was void as against public policy—*Tarun Soonduree Chowdrain* vs. *Court of Wards*, 20 W. R., 446; see also *Sheikh Abed Hossein* vs. *Lalla Ram Sarun*, 13 W. R., 426. So a contract made to assist another in carrying on litigation against a third party out of a spite and ill-feeling to such third party is against public policy—*Ramun Dass Banerjee* vs. *Huro Lall Shaha*, 10 W. R., 140; but not a fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered—*Ram Coomar Coondoo* vs. *Chunder Canto Mookerjee*, 2 App. Cas. 186; I. L. R., 2 Cal., 233; 13 B. L. R., 530; *Manirakhan Singh* vs. *Bhodoy Singh*, 12 W. R., 133; *Joymohun Lall* vs. *Mussamut Buddun Koer*, 9 W. R., 243; or where the consideration is not a share but a lease of the property—*Pitchakutti Chetti* vs. *Kumala Nayakkan*, 1 Mad., 153. But where a Hindoo widow assigned to a person, as her attorney, an 8-anna share in the subject-matter of the litigation for the advances and expenses which the assignee or his assigns might reasonably make for her maintenance and for carrying on the suit, and the other 8-anna, to the assignee or his assigns as remuneration for their trouble and labour to be bestowed in the conduct and management of the suits, it was held that the assignment of the first 8-anna was binding upon the widow's reversionary heirs to the extent of the advances and expenses, but that that of the second was not binding, if not on the ground of champerty, upon the ground that it was an unconscionable bargain and speculation if not a gambling contract—*Grose* vs. *Amirtamoye Dassi*, 4 B. L. R. (O.C.), 1.

Where an ignorant suitor was under an apprehension of losing his suit from the false colour given to it by his attorney, who represented the necessity of making a bargain with a more favoured client; and this bargain was of a most oppressive kind, for a division of a fund which must have been recovered, and in which the plaintiff really risked andthe attorney knew he really risked nothing: *Held*, the contract could not stand for more than *bonâ fide* advances—*Mulla Jaffarji Tyebali Saib* vs. *Yacali Kadar Bi*, 7 Mad., 129.

No suit can be brought against the owner of a ship, on a bottomry bond given by the master, as the master has no authority to pledge the owner's credit by the instrument hypothecating the ship by way of bottomry, nor can any suit be brought on a bottomry bond in a Court which has no admiralty jurisdiction—*Gladstone* vs. *Harrison*, 24 W. R., 50.

In *Param Singh* vs. *Lalji Mal*, I. L. R., 1 Alla., 403, plaintiff had alienated certain property to defendant for the purpose of defrauding his son. The alienation was successful in defeating an attachment made by one of plaintiff's creditors, yet he was held entitled to recover, on showing the real nature of the transaction.

Voluntary Payments.—Voluntary payments give no cause of action. Thus where A paid money in his own name to stay a decree against others, he could not get it back—*Abdool Wahab* vs. *Drummond*, 2 W. R., Act X, 1848. And where A, a purchaser of B's title, and B were afterwards sued for arrears due by B, and A paid to save the tenure from sale, it was held he could not sue B for it—*Ram Buksh Chatlangea* vs. *Hridoymonee Dabee*, 1 W. R., 446: but see section 70 of the Contract Act. So also a shareholder voluntarily paying an arrear of revenue for a defaulting co-sharer who has a separate account under section 13, Act XI, 1859, cannot claim to be reimbursed by the defaulter—*Kishen Chunder Ghose* vs. *Muddun Mohun Muzoomdar*, 7 W. R., 365. A having obtained the right, title and interest of B in execution, paid in a sum of money in another execution against C, in which the interest of B and the sons of C was attatched: it was held, as there was nothing to show how B could be liable for C's debt, the payment of A was voluntary and he could not recover from B—*Collector of Shahabad* vs. *Ram Buddan Singh*, 10 W. R., 400. A obtained a decree against C and D. C had, as guardian of a minor, got a decree against A for a certain sum and A deposited the amount; but withdrew it in execution of his suit against C and D. Subsequently C sued D for contribution, on the ground that she had repaid her minor son the sum taken by A: *Held*, it was a voluntary payment—*Raj Lakhi Debi* vs. *Taramani Chowdrain*, 2 B. L. R. (A.C.), 281.

In both the cases just cited the Privy Council decision in the case of *Fatima Khatun* vs. *Mahomed Jan Chowdry*, 1 B. L. R., 21; 10 W. R. P. C., 29; 12 Moore, 65, was discussed and held not to apply. In that case a family estate was about to be sold under a decree against A's husband. A had a lien for dower on the estate, and, after vainly opposing the order to sell, deposited the amount decreed in Court under protest and with a declaration of bringing a regular suit to set aside the sale-order; but she agreed that the sum should be handed over to the decree-holder: *Held*, that the deposit into Court was to prevent a sale that would be injurious to A's rights, and the only voluntary act was the consent given that instead of the money remaining in Court it should be paid over until the rights of the parties could be determined, and was not a voluntary payment. This case was not followed in *Mussamu Asbibun* vs. *Ram Persad Das*, 1 Shome 25; but the authority of the latter case is very doubtful, and it is opposed to the late case in the Privy Council of *Dooli Chand* vs. *Ram Kishen Singh*, L. R., 8 Ind. App. 93. Payment of the putni rent by the mortgagee of a taluk in order to avoid a sale for arrears of rent is not a voluntary payment, even though the mortgagee had caused to be inserted in the mortgage deed a stipulation for his protection in case such a sale should take place—*Mohesh Chunder Banerjee* vs. *Ram Persaud Chowdhry*, I. L. R., 4 Cal., 539. As to what amounts to a voluntary payment, see *Sreenarain Bagchee* vs. *Smith*, I. L. R., 4 Cal., 807. See also *Luckee Kant Dass* vs. *Shib Chunder Chuckerbutty*, 12 W. R., 462. A made a voluntary payment to B on account of C. B subsequently sued C and realized the debt. *Held*, that A could not sue B: but that C could have pleaded A's payment in the action, and could sue to set the decree aside and recover the money—*Joytara Dassee* vs. *Hurry Kishen Dey*, S. D. A., 1st February, 1860.

Embankments.—As to the liability of zemindars to keep up embankments—see *Nuffer Chand Bhatto* vs. *Jogendro Mohun Tagore*, I. L. R., 7 Cal., 505.

Possession.—A suit for recovery of possession on title will not lie on mere previous possession—*Wise* vs. *Ameerunnissa Khatoon*, L. R., 7 Ind. App. 73.

Cause of Action—Caste.—A suit will lie for restoration to caste, and damages or compensation for cost of restoration to caste lost in consequence of the defendant having accused plaintiff of adultery—*Gopaul Gurain* vs. *Gurain*, 7 W. R., 299; so also a suit lies to gain re-admission to caste only—*Sonaram Gazor* vs. *Obhyram Gazor*, 7 S. D. A., Sel.,

344; but though suits may be instituted for restoration to caste or to membership of religious associations, a suit will not lie to compel Hindoos against their will to ask others to their houses and entertainments—*Joychunder Sirdar* vs. *Ramchurn*, 6 W. R., 325; nor to obtain a declaration of a right to membership of a *Somaj* (society) upon the allegation that the other members have excluded him from it, if the exclusion neither deprived him of caste nor affected any right to property—*Sudharam Patar* vs. *Sudharam*, 3 B. L. R. (A.C.), 91; 11 W. R., 457, and the cases collected there; and *Hopkinson* vs. *Marquis of Exeter*, L. R., 5 Eq., 63; nor to enforce the performance of certain services by barbers on the ground of custom or established usage—*Rajkisto Majee* vs. *Nobaee Seal*, 1 W. R., 351; and a claim to be *Chalvadi* of the *Lingayet* caste of Bagalkot will not be entertained by the Civil Courts—*Shankara* vs. *Hanma*, I. L. R., 2 Bom., 470; so a right to receive fees as head of a caste cannot be decided in the Civil Courts—*Murar Daga* vs. *Nagria ganesha*, 6 Bom., 17.

Cause of Action—Religious Ceremonies.—It is doubtful if the Civil Courts have any jurisdiction to entertain a suit not involving any civil rights, but to declare the right to perform or have performed religious ceremonies—*Namboory Seetapaty* vs. *Kanoocolanoo Pallie*, 3 Moore, 359; *ex. gr.* the right to have an adoption performed—*Raj Coomar Dossee* vs. *Nobo Coomar Mullick*, 1 Boulnois 137; or to have certain religious observances due to his rank—*Striman Sadagopa* vs. *Kristna*, 1 Mad., 301; but a suit will lie to recover dues for certain religious services performed; and if to determine the right thereto it becomes necessary to determine incidentally the right to perform certain religious services, the Court has jurisdiction to do so—*Tiru Kishnama Chariar* vs. *Krishnasawmi Tata Chariar*, L.R., 6 Ind. App. 120; I. L.R., 2 Mad., 62; but a suit to declare a right to parade a bullock on certain days will not lie—*Rama* vs. *Shiveram*, I.L.R., 6 Bom., 116; see also *Dhadphale* vs. *Gurav*, I.L. R., 6 Bom., 122. A suit by a Hindoo mother, as the guardian of her infant daughter, for a declaration that the alleged marriage of the daughter with the defendant was null and void, is a suit of a civil nature, which may be entertained in a Civil Court—*Anjona Dossee* vs. *Proladh Chunder Ghose*, 14 W. R., 132; *id.*, 403; see *Gasper* vs. *Gonsalves*, 13, B. L. R., 109. The titular Kazi of a pergunnah cannot recover fees voluntarily paid to another party for the performance of ceremonies which he might have been, but had not been called on to perform—*Bhoolwa* vs. *Syud Omur Ali*, S. D., N. W., 1859, p. 127; and where no fees are of right appurtenant to the office of *Chalvadi*, but gratuities may be given to him, no action for these, as money had and received, will lie against an intruder in the office—*Shamkara* vs. *Hanma*, I. L. R., 2 Bom., 470. A suit will not lie to compel *jujmans* to employ a particular *purohit*, though if certain *purohits* are employed, a suit by one of them or his representative will lie against the others for declaration of his right to enjoy the profits—*Beharee Lall* vs. *Baboo*, 2 Agra, 80; *Becharam Banerjee* vs. *Sreemuttee Thakormonee Debia*, 10 W. R., 114; *Khedro Ojha* vs. *Mussamut Deo Ranee Coomar*, 5 W. R., 222; *Magju* vs. *Ramdyal*, 8 B. L. R., 50; if based on contract or prescription by long and uninterrupted usage—*Krishna Aigan* vs. *Anantarama Aigan*, 2 Mad., 330; *Ramasamny Aigan* vs. *Venkata Achari*, 9 Moore, 354; see also *Hur Lall* vs. *Jeorakhan Lall*, S. D., N. W., 1862, p. 314; *Chonee Lall* vs. *Gouree Sunker*, *id.*, 1866, p. 8; and a suit will lie to declare the right to break a curd pot in a certain part of a temple on a fixed day—*Narayan Sudanand Bava* vs. *Balkrishna*, 9 Bom., 413; or to receive holy cakes in virtue of an hereditary office to chant hymns—*Narasimma Chariar* vs. *Chariar*, 6 Mad., 449; and in Bombay a suit for damages by a village priest against an intruder who deprives him of his fees will lie—*Vithal Krishna Jorhi* vs. *Anant*, 11 Bom., 63; or against a *jujman*, who has employed and paid another to perform certain ceremonies, to recover the amount of the fee which would be payable to plaintiff had he been called in—*Dinanath Abaji* vs. *Sadashiv Hari Madhave*, I. L. R., 3 Bom., 9; and the *Vatandar Joshi* of a village has an action for damages against an intruder in the office who has received fees properly payable to the former, but an injunction will not be granted to restrain the intruder from acting—*Rajavalad Shirapa* vs. *Krishna Bhat*, I. L. R., 3 Bom., 232. And no suit is maintainable to vindicate plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits, or emoluments—*Sangapa* vs. *Gangapa*, I. L. R., 2 Bom., 476. An action will lie to declare a person's right to perform the duties of *Pujari* and receive the profits of a Mandir—*Pranshankar* vs. *Prannath Mahanand*, 1 Bom., 12; for the offerings of certain temples on the ground of "*Mourosee Milkeut*" or hereditary property—*Sheo Suhaye Dhamee* vs. *Bhoonee Mahtoon*, 3 W. R., 33; for a share in a *Brit Mahabrahminee* consisting of fees received by plaintiff and defendant for the performance of certain religious ceremonies in certain villages in Behar—*Nundram* vs. *Kashe Pande*, 4 S. D. A., Sel. 89. In short, there is no doubt that the Civil Courts will recognise and enforce the rights of persons holding office connected with the management and regulation of pagodas; and if the holder of such office were entitled to remuneration for his services in the way of salary or otherwise, he would have a civil right entitling him to maintain a suit if that remuneration were improperly withheld. So too, suits are commonly entertained for the purpose of trying and deciding who are fit and proper persons of right to be entitled *Dharmakartas* of a pagoda. In such cases it will be found that the offices have a secular character and are so dealt with, though religious duties are attached to them; the occupants being employed to exercise business functions either as trustees and managers of the property and funds of the pagoda, or as overseers in the regulation of its affairs generally, and having necessarily civil rights and liabilities which may properly be made the subject of a civil suit; but nothing of this kind can be said of a plaintiff in his purely religious office of *guru*. The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and

provision, an imperfect obligation of a moral and not a civil nature. Of such obligations the present Civil Courts cannot take cognizance—*Striman Sadágopa* vs. *Kristna Tuta Chareyar*, 1 Mad., 301. Where a *swami* or chief priest of the *smartava* sect claimed an exclusive right of being carried crosswise in a palki on ceremonial occasions in virtue of a grant from the ruling power to a predecessor in office, their Lordships of the Privy Council had some doubt whether he could maintain an action against a party who had assumed the like privileges—*Sri Sunkur Bharti Swami* vs. *Sidha Lingayah Charanti*, 6 W. R. (P. C.), 39. Since the permanent settlement a claim will not lie against a zomindar for *Mukkadami Chakladare or Chowdhari* dues—*Munsurnath Chowdhry* vs. *Bhowany Churn*, 4 S. D. A., Sel., 159; *Kulian Chowdhree* vs. *Rojah Ikbal Ali*, id., 272. A suit will not lie to declare a person entitled to certain fees voluntarily paid to the plaintiff *as chowdresee* for the use of a market place—*Poorun Mul* vs. *Khedoo Sahoo*, 7 S. D. A., Sel., 336; *Bhinuk Chowdhree* vs. *Collector of Jounpore*, 2 Agra, 71; nor for procuring boats, *Ram Deehul* vs. *Chukhoo*, 1 *Alla.*, 291.

No Cause of Action—Specific Remedy.—If the Legislature imposes a duty the non-performance of it is actionable—*Ronusamy Terar* vs. *Collector of Madura*, 3 Mad., 35; but if it creates an obligation to be enforced in a specific manner, it cannot as a general rule be enforced in any other way (see *Wolver Hampton Water Works Co.* vs. *Hawkesford*, 28 J. L. C. P., 242, cited in the notes to *Ashby* vs. *White*, Smith's Lea. Ca. 156); and on this principle no suit will lie in the Civil Courts, on account of compensation for loss sustained by Government declaring a private ferry public—*Collector of Patna* vs. *Romanath Tagore*, 7 W. R., 191; nor for the ferry itself—*Gov.* vs. *Brijosoondry*, 7 S. D. A. Sel., 583.

In the same way, special procedure has been provided in the Code of Criminal Procedure, and it has been held that a suit will not lie for obstructing a public road, even if the plaintiff had dedicated the road to the public, unless he has sustained special inconvenience—*Bhageeruth Dass Koyburto* vs. *Chundee Churn Koyburto*, 21 W. R., 462; *Bhageeruth Rishee* vs. *Gokul Chunder Mundul*, 18 W. R., 58; *Burada Pershad Moostafee* vs. *Gora Chand Moostafee*, 12 W. R., 160; *Abdool Hye* vs. *Ram Churn Singh*, 11 W. R., 445. *Saku* vs. *Ibrahim Aga*, I. L. R., 2 Bom., 457; otherwise where the plaintiff has suffered special damages, *Rajcoomar Singh* vs. *Sahebzada Roy*, I. L. R., 3 Cal., 20. Nor will a suit lie to set aside a sale of property carried out under section 185, Act XXV of 1861—*Bukhor Singh* vs. *Government*, 8 W. R., 207. Where a penalty given by statute is enforceable in a particular way, it cannot be enforced by action—*London and Brighton, Ry. Co.* vs. *Watson*, 4 C. P. D. 118. But where by statute a new mode of procedure is given when an action had been previously maintainable, the right of action is not taken away, though it may affect the question as to costs—*Anglo Italian Bank* vs. *Davies*, 9 Ch. D. 275; *Clutton* vs. *Lee* 7 Ch. D. 541. See also *Branson* vs. *Municipal Com. of Madras*, I. L. R., 2 Mad. p. 389. A suit will lie to compel the vendor of land to register the deed of sale and give possession of the property—*Ram Ghulam* vs *Chotey Lal*, I.L.R., 2 Alla., 46. When the mortgagee of a house has obtained a decree against the mortgagor and a purchaser from him subsequent to the mortgage, a suit will lie against the latter for diminishing the security by taking away the materials of the house—*Moulvi Omer Kurim* vs. *Lala Shewan Lala*, 4 C.L.R., 291.

The owner of a ferry granted under a Government settlement will have an action against any person running a ferry over the same spot, when the latter does not use the ferry for his own conveyance, and that of his servants merely—*Luchmessur Singh* vs. *Leelanund Singh*, I. L. R., 4 Cal., 599, 3 C. L. R. 427. When a plaint alleged that plaintiff held a haut on his land for many years, that the defendant had set up a rival haut on the same days, and tried to prevent persons from attending plaintiff's haut; that this led to the Magistrate's passing an order prohibiting the plaintiff from holding his haut, in consequence of which he suffered loss and damage: *Held*, a good cause of action—*Gopee Mohun Mullick* vs. *Taramoni Chowdhrani*, 4 C. L. R., 300; I. L. R., 5 Cal., 7.

Provisions have been made in regard to execution of decrees, and when a decree-holder can proceed under them he cannot bring a regular suit. Thus a suit will not lie for the costs of a receiver appointed during execution—*Kosee Mahomed* vs. *Lalla Jussodalal*, W. R., 1864, p. 247. So where, having obtained a decree for money, A sued to recover the unsatisfied balance thereof from B, alleging that the property of the deceased judgment-debtor was in his possession: *Held*, that he should have enforced his decree by execution and sale, or by execution and attachment, and appointment of a receiver, and no regular suit would lie—*Mirza Mahomed Aga Ali Khan Bahadur* vs. *The Widow of Balmakund*, L. R., 3 Ind. App. 241; see also *Tarak Narain Singh* vs. *Puncha Singh*, W. R., 1864, p. 376; and if a plaintiff neglects to execute until execution is barred by limitation he cannot revert to a regular suit—*Sheikh Gholam Hossein* vs. *Mussamut Alla Rukhee Bibi*, 3 Alla., 62; but otherwise if the decree were such as is not capable of being executed, such as a foreign decree, or a decree merely declaratory—*Nunn* vs. *Nunn*, 8 Ir. L. R., 298; *Khusal Das* vs. *Baburao*, 12 Bom., 212; *Modoosudun Paul* vs. *Doyal Chund*, 212; 10 B. L. R., App. 35; but a suit will not lie in a Small Cause Court on a Civil Court decree—*Mancharan* vs. *Bakshi Saheb*, 6 Bom., 231; nor will a regular suit lie on a rent decree of the Revenue Court —*Ananda Moyi* vs. *Patit*, B. L. R., (F. B.) 18; but a suit will lie in the Bombay High Court on a Small Cause Court decree—*Fakirapa* vs. *Pandurangap*, I. L. R., 6 Bom., 7; though not in Calcutta—*Golam Arab* vs. Curreem Bux, I. L. R., 5 Cal., 295. It is doubtful if a new suit will lie upon a decree pending appeal—*Ranee Imamum* vs. *Hurdyal Singh*, 5 W. R., 276; or barred by limitation—*Fakeerapa* vs. *Pandurangal*, I. L. R., 6 Bom., 7; see, however, *Munshi Golam Arab* vs. *Cureem Bux*, I L. R., 5 Cal., 294; *Attermony* vs. *Hurry Doss*, I. L. R., 7 Cal., 74; *Flower* vs. *Lloyd*, 6 Ch. Div. 297. Plaintiff brought a suit for possession on a

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contract of sale and obtained a decree against his vendor, a mortgagor who had sold to him his right, title and interest. Plaintiff never took out execution, and after the lapse of more than three years he sued to redeem the mortgage. It was held that plaintiff's title under the purchase deed and decree existed, although it could not be enforced by execution, and the suit would lie—*Jugur Nath* vs. *Bal Gobind*, 1 Alla., 154. Moneys realized as due under a decree, or realized improperly, are recoverable by application to the Court executing the decree and not by regular suit—*Partab Singh* vs. *Bani Ram*, I. L. R., 1 Alla., 61; dissenting from the opinion of Stuart, C. J. in *Agra Saving's Rank* vs. *Mitter*, I. L. R., 1 Alla., 388. The right to bring a regular suit is in no case lost if the plaintiff, though a party to the suit, has not been a party to the decree, although the words in section 11, Act XXIII, 1860, are "party to the suit"—*Gour Kishen Chowdhry* vs. *Mahomed Hossein Chowdhry*, 10 W. R., 191.

The same rule applies to cases in which an appeal lies. A suit will lie to set aside a decree on the ground of fraud—*Golab Chand Baboo* vs. *Prosunno Coomaree Debia*, 20 W. R., 86; Lim. Act, Sch. II, Cl. 95; *Flower* vs. *Lloyd*, 6 Ch. Div. 297; but not if the plaintiff urged fraud in the first Court after the decree had been passed and failing did not appeal, though an appeal was allowed—*Raj Kishen Mookerjee* vs. *Modhoosoodhun Mundul*, 17 W. R., 413; and unless the parties sue to set aside the decree directly, it cannot be impugned indirectly and must be given effect to—*Huro Chunder Biswas* vs. *Nobo Kissen Mookerjee*, W. R., 1864, p. 159. In *Mewa Lall Thakoor* vs. *Bhujhun Jha*, 22 W. R., 213, it was held that no such suit would lie; and see *Flower* vs. *Lloyd*, 10 Ch. D. 327.

Privilege.—A Judge is not liable for words spoken in office—*Seaman* vs. *Netherclift*, 1 C. P. D., 540; 2 C. P. D., 53, and cases there cited; and the same privilege extends to letters which a Judge in this country is bound to forward to the High Court—*Ally Kurem* vs. *Sands*, Boulnois, 1; but see S. D., N. W., 1853, p. 313. So in England a Counsel is absolutely privileged for words spoken—*Seaman* vs. *Netherclift*; 1 C. P. D., 540; but whether this rule applies in India has not been decided so far as I know. In the *Queen* vs. *Chrestien*, 2 Alla., 473, it was held that a pleader or mooktyar is not liable if, relying on the statement of his client, he in good faith introduced defamatory matter in the pleadings; and see sections 148-50 of the Evidence Act.

Defamatory and libellous expressions, when used by a party in the course of a judicial proceeding, are not actionable—*Maha Ranee Kummul Koomaroo* vs. *Hedger*, 7 S. D. A. Sel., 33; *Chowdhry Goor Dutt Singh*, 2 Agra, 33. And the rule in England is that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office—*Jex* vs. *Skinner*, 1 Lofft., 55; thus where a witness said a will was a rank forgery; *held*, that the statement was privileged and no action for slander would lie, although the jury found that the words were not spoken by the defendant in good faith as a witness, and that he spoke them as a volunteer, and for his own purposes and maliciously—*Seaman* vs. *Netherclift*, 1 C. P. D., 540; 2 C. P. D, 53, and cases there cited; but it has been held that though a witness may be privileged as regards words and statements having direct reference to or bearing on the case, yet when he goes far beyond it and does not act on good faith he is liable for defamation—*Queen* vs. *Purseram Dass*, 2 W. R., Cr. R., 36; 3 W. R., Cr. R. 45; but see *Gunnesh Dutt* vs. *Magnuram*, 11 B. L. R., 321; and a party who pleads libellous matter irrelevant to the points in dispute, and the pleading is improper, may be liable for defamation—*Constantine* vs. *McConnell*, S. D., N. W., 1864, p. 486; and where a party applying to a judge to transfer a case from a Munsif on the ground of ill-feeling, went further and accused him of borrowing money from his adversary and falsifying evidence in another case, it was held a suit would lie—*Shibnath Tulapuitra* vs. *Sat Cowree Deb*, 3, W. R., 198. In any case the privilege only extends to statements made in judicial proceedings—*Chowdhry Goor Dutt Singh* vs. *Gopal Dass*, 1 Agra, 33.

Defamation.—A suit will lie for damages for exhibiting an effigy—*Petumber Dass* vs. *Dwarka Pershad*, 2 Alla., 435; or for mere abuse—*Sreenath Mokerjee* vs. *Komul Karmokar*, 16 W. R., 83; *Kali Kumar Mitter* vs. *Ramgati Battacharjee*, 6 B. L. R., App., 99; *Kashiram* vs. *Bhadu*, 7 Bom., 17; and see *Moulvie Golam Hossein Vakeel* vs. *Hur Gobind Dass*, 1 W. R., 19. But see *Srikant Roy* vs. *Satcowri*, 3 C. L. R., 181. The surviving members of a joint family cannot sue for defamation of a deceased member—*Luckumsey Rowjee* vs. *Harbun Nursey*, I. L. R., 5 Bom., 580.

Contribution.—The right to contribution, in the absence of contract, rests on the equitable doctrine that *in æquali jure* the law requires equality; one shall not bear the burden of the rest—*Ram Bux Chittangeo* vs. *Modhoosoodun Paul Chowdry*, 7 W. R., 377; and a suit will lie by one co-sharer, who pays the revenue of the whole estate, against the others—*id.*; or against the mortgagee of any of them who has foreclosed—*Gunga Gobind Mupdul* vs. *Ashotoosh Dhur*, 21 W. R., 255; or by one judgment-debtor paying the amount of a joint and several decree passed against him and the defendant—*Sappanachari* vs. *Chakkarapattan*, 1 Mad., 411; and a person found in possession of one-half the mortgaged land is charged with one-half the debt—*Syud Mobaruck Hossein* vs. *Seo Gobind Misser*, 18 W. R., 61; but no such suit lies against a member of a Hindu family for a joint debt when the plaintiff has not accounted for his management—*Bissonath* vs. *Goburdhun*, 17 W. R., 336; though it will by one member against another for his share of joint debt—*Bose* vs. *Bose*, Fulton, 401; though the mere existence of a decree without payment is not sufficient to support the case—*Ram Pershad Singh* vs. *Singh*, 11 B. L. R., 76. No suit lies for money paid under a joint decree, if the defendant can show he had no substantial interest in the suit—*Serajal Haq* vs. *Roy Luchmeepat Singh*, 20 W. R., 242; nor by one

wrong-doer against another if the plaintiff knew he was doing an unlawful act; but the mere fact that the act was illegal is not sufficient—*Sreeputty Roy* vs. *Loharam Roy*, 7 W. R., 384; *Nawab Sidhee Nuzur Ally Khan* vs. *Ojoodyharam Khan*, 10 Moore, 562; *Ruthee Sidar* vs. *Shujoo Puramanick*, 20 W. R., 235; *Ram Chunder Shurma* vs. *Ram Chunder Pal*, 23 W. R., 226; *Suput Singh* vs. *Nurit Tewari*, I. L. R., 5 Cal., 720. This rule has not been always kept in view. In the case of *Harnath* vs. *Haree Singh*, 4 Alla., 116, the broad rule was laid without any qualification that one trespasser could not sue another for contribution on a joint decree, while in Calcutta suits of the same nature have often been decreed without objection—*Rakhal Monee Dossee* vs. *Brojendro Gopal Roy*, 23 W. R., 303; *Collector of Bograh* vs. *Shama Sunker Mozoomdar*, 6 W. R., 230; *Bijoy Gobind Naik* vs. *Kalee Prosunna Naik*, 16 W. R., 294.

The decree of the Appellate Court did not award mesne profits, but in execution the first Court realised them from plaintiff; *held*, he could not sue his co-defendants for contribution as mesne profits were not authorised by the decree—*Bunwaree Lall Sahoo* vs. *Sadhist Lall*, 25 W. R., 269. In a suit for contribution all the parties interested should be made parties—*Khema Debia* vs. *Kumolakant*, 10 W. R., 10; and the plaint must set out the amounts due by each party sued, otherwise it should be rejected—*Bholanath Chatterjee* vs. *Indur Chand Doogur*, 14 W. R., 373.

Partition.—No suit will lie for partition of an estate paying revenue to Government, where the person suing has less than a full interest in the property, such as an estate for life—*Phoop Singh* vs. *Soorga Pershad*, S. D., N. W., 1856, p. 198; nor where the revenue payable to Government must be apportioned when a division of the estate is made—*Spencer* vs. *Puhul Chowdhry*, 15 W. R., 471; *Mohsum Ali* vs. *Nuzum Ali*, 6 W. R., 15; but otherwise if it is not an estate, as a *shikmee talook*—*Mothoor Chunder Kurmokar* vs. *Manick Chunder Bungo*, 6 W. R., 192; nor if it is *lakheraj land*—*Futteh Bahadoor* vs. *Janki Bibi*, 13 W. R., 74; *Janokee Bibi* vs. *Luchmun Pershad*, 17 W. R., 137; nor if it is private property subject to a trust charge—*Ram Coomar Paul* vs. *Jogendro Nath Paul*, I. L. R., 4 Cal., 56; nor if the parent estate has already been divided and the revenue apportioned and the partition sought is of an accretion—*Ranee Shama Soondoree Dabia* vs. *Koer Poresh Narain Roy*, 20 W. R., 182; or a piece of land left joint at the previous partition—*Bama Soondaree Dabee* vs. *Kashee Kishore Roy*, 22 W. R., 245; nor by a *mokurridar* for only a portion of the share of a co-proprietor, the proprietor not being parties—*Parbati Churn Deb* vs. *Ainuddin*, I. L. R., 7 Cal., 577; but a suit will for partition of a defined portion of an estate—*Chunder Nath Nundi* vs. *Hur Narain Deb*, I. L. R., 7 Cal., 153; but see *Ram Joy Ghose* vs. *Ram Runjun*, 8 C. L. R., 367. No suit will lie to set aside a partition made by the Collector, or modify the areas given and the assessment on them; but the partition does not take away the civil rights of the sharers *inter se*, and a suit will lie by a sharer not a party to it, for a declaration that he has a share in the property allotted to another—*Sheo Pershad Sookol* vs. *Shunker Sahoy*, 16 W. R., 190; *Koonj Beharee Singh* vs. *Niroo Singh*, 15 W. R., 291; or a larger share than that allowed him—*Spencer* vs. *Puhul Chowdhri*, 15 W. R., 471; but not if he has been a party to the proceedings before the Collector—*Shaikh Zakerali* vs. *Jugdessuree*, 1 W. R., 323; *Ram Sahaya Sing* vs. *Syud Muzhar Ali*, 2 B.L.R., App., 40. The regulation does not apply to the partition of separate estates, which are intermixed in a portion common to all—*Jhabu Lall Roy* vs. *Collector of Tirhoot*, 21 W. R., 272; nor does it apply to cases where the lands of several estates are intermixed and are held jointly in certain shares by the different proprietors—*Doorga Kant Lahoury* vs. *Radha Mohun Gooho*, 7 W. R., 51; and in neither case can the Collector be compelled to make a partition.

The law of partition in the North-West is Act XIX, 1863, and under it suits for partition are exclusively cognizable by the Collector. No appeal lies from his order refusing an application for partition and to try a question of title—*Kunhye Ram* vs. *Senrakhun*, S. D., N. W., 1864, p. 33; *Musst. Brija* vs *Bholanath*, 2 Agra, 182; but the revenue authorities are bound to grant a partition to a party whose title has already been determined by a Court of competent jurisdiction—*Musst. Moojeebunnissa* vs. *Azeemunnissa*, S. D., N. W., 1865, p. 201. A suit for partition of orchards not liable to a portion of the village assessment does not lie under Act XIX, 1863—*Oodey Ram* vs. *Sirajool Hossein*, 2 Agra, 241.

A sharer in a jungle grant cannot sue until the grant has become absolute by completing all its provisions—*Khetra Kowari* vs. *Dulmurden Sech*, S. D., N. W., 1861, p. 344. Where a person obtained a decree from the Civil Court declaring his right to certain shares in a village and directing a partition, but did not execute it, *held*, that he was not entitled to partition under the Act—*Kishen Singh* vs. *Dabee Singh*, 2 Agra, 272; and, generally, where a private partition has been made and acted on, and no personal equity is asserted, a suit to establish the state of things previous to it will not lie—*Mussamut Bhowanee Koonwer* vs. *Thakoor Das*, 2 Agra, 277; nor for a fresh partition—*Sheo Dass* vs. *Mussamut Longee*, S. D., N. W., 1851, p. 145; *Ajudhya Pershad* vs. *Kristo Dyal*, 15 W. R. 165; unless by an auction-purchaser for arrears of revenue—*Gungadeen Misser* vs. *Kheeroo Mundul*, 14 B.L.R., 170. Where the lands have been partly divided, a partition of the undivided portion will lie—*Sadho Lall* vs. *Ramun Pershad*, S. D., N. W., 1864, p. 441; but a suit will not lie for partition of a portion only of a joint undivided estate—*Nanabhai Vallabdas* vs. *Nanabhai Haribhai*, 7 Bom., 46; *Mithoo Lall* vs. *Gholam Nusseeruddeen*, 4 Agra, 276; *Parbuti Churn Deb* vs *Ainuddeen*, I. L. R., 7 Cal. 577; though it will for a partition of one estate without all the estates being divided—*Srimati Padumani Dasi*

vs. *Srimati Jugadamba Dasi*, 6 B.L.R., 134. For the law of partition among Hindus, see *Soorjumoney Dossee* vs. *Denobundhoo Mullick*, 1 Boulnois, 228, 287.

Putnee.—Section 14 of Regulation VIII of 1819 only contemplates that a party having a recognized interest should deposit the rent; a person who has merely applied for registration is not so entitled—*Bukshee* vs. *Mackintosh*, W. R., 1864, p. 53.

Partnerships.—Section 265 of the Contract Act is only an enabling section, and does not take away the ordinary right of suit in any Civil Court having jurisdiction to have the partnership accounts taken—*Lutchman Lall* vs. *Ram Lall*, I. L. R., 6 Cal., 521; *Ladubhar Premchand* vs. *Resichand Venichand*, I. L. R., 6 Bom., at p. 145; but see *Prosad Doss Mullick* vs. *Russick Lall Mullick*, I L. R., 7 Cal., 157.

Partnership Suits:—For a full and valuable discussion as to the practice, pleading and procedure, which should be followed in these suits, see *Ram Chunder Shaha* vs. *Manick Chunder Banikya*, I.L.R., 7 Cal., 428; 9 C. L. R., 157.

Account.—For the proper procedure to be observed in taking accounts—see *Annada Prosad Roy* vs. *Dwarka Nath Gungapadhya*, 8 C. L. R., 321; and the way in which such suits should be framed—see *Gobind Mohun Chuckerbutty* vs. *Sheriff*, I. L. R., 7 Cal., 169; 8 C. L. R., 357; *Soshi Bhoosun Pal* vs. *Guru Churn Mookhopadhya* I. L. R., 7 Cal., 89; *Degamber Mozumdar* vs. *Kallynath Roy*, I. L. R., 7 Cal., 654.

Tenures.—A person who voluntarily abandons a permanent transferable tenure for a long period must be considered as having relinquished it and cannot recover it—*Chunder Monee Nya* vs. *Shumbho Chunder*, W. R., 1864, p. 270.

Reversioner.—When a Hindu widow having one sonless daughter is in possession of her husband's estate, a suit will lie at the instance of the next heir in reversion at the death of the daughter to prevent the mother and daughter from alienating the property to the prejudice of his reversionary right—*Gauri Dat* vs. *Gur Sahai*, I. L. R., 2 Alla., 41.

Right to Settlement.—It has been the invariable practice to allow a person who alleges that he is entitled to a permanent settlement in resumed land to go into Court and obtain a declaration of that right, and the Government has invariably recognized the right so declared by making or altering the permanent settlement accordingly—*Krishna Chundra Sandyal Chowdhry* vs. *Hurish Chunder Chowdhry*, 8 B. L. R., 524; but whether any person could compel Government to settle with him is not clear—*Government* vs. *Tekait Pokharun Sing*, 7 W. R., 465; nor is it competent for a Civil Court to direct that the Collector will enter into engagements with a zemindar after a temporary settlement, though it may declare his prior right to a settlement on agreeing to the assessment and other terms fixed by the revenue authorities—*Government* vs. *Sheikh Fukeerullah*, 6 S. D. A., Sel., 208; *Watson & Co.* vs. *Brojo Soonduree Dabee*, 10 W. R., 395; but even in a non-permanent district, the Civil Courts can decide the rights of parties as having a share in the settlement—*Beejoy Keot* vs. *Goria Keot*, I. L. R., 7 Cal., 437. Again, no suit will lie against the Board of Revenue's orders assessing land under Act IX, 1847, though the land assessed may have been a re-formation on an old site—*Dewan Ramjeowan Singh* vs. *Collector of Shahabad*, 18 W. R., 64; 19 W. R., 12; but whether the real owner cannot follow his property into the hands of those keeping him out of possession, be it Government or a third party, is not certain—*Collector of Moorshedabad* vs. *Roy Dhunput Singh*, 23 W. R., 38.

Market.—A suit to determine whether a person can hold a market on certain days will lie in the Civil Courts—*Thakoor Singh* vs. *Sheopershad Ojhah*, 5 Alla., 8; but the establishment of a new market on one's own land is not actionable—*Kadarnath* vs. *Rughonath*, 6 Alla., 104; but if a person establishing a new haut prevents others from frequenting the old haut, and a disturbance ensues, which results in the Magistrate prohibiting the owner of the old haut from holding it on his usual days and loss ensues, a suit will lie by the owner of the old haut to declare his right to hold it upon the usual days—*Gopi Mohun Mullick* vs. *Taramoonee*, I. L. R., 5 Cal., 7.

Pending suits.

12. Except where a suit has been stayed under section 20, the Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India having jurisdiction to grant such relief, or in any Court beyond the limits of British India established by the Governor-General in Council and having like jurisdiction, or before Her Majesty in Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

This section applies to H. C. and M. S. C. C.

The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree—*Fakuruddeen Mahomed Assan* vs. *The Official Trustee*, I.L.R., 7 Cal., 82.

Pending the final hearing in appeal of a suit for confirmation of possession of certain land, and for the recovery of the produce of such land alleged to have been carried away by the defendants, the plaintiff brought a suit again asking for confirmation of possession, but also for the recovery of other produce which had been taken away by the defendants since the institution of the first suit. *Held*, that the second suit was not barred—*Bissessur Singh* vs. *Gunput Singh*, 8 C.L.R., 113.

Res judicata.

13. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is

presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.

This section applies to H. C. and M. S. C. C.

General.—According to the rule of *res judicata* in England, says Garth, C.J., in *Denobundoo Chowdry* vs. *Kristomonee Dossee* (Ind. Law. Rep., 2 Cal., 152), "in order to make an adjudication in one suit a bar to the plaintiff's proceeding in another, it must be shown: 1st, that the parties in both suits are the same; 2nd, that the thing sought to be recovered is the same; 3rd, that the grounds upon which the claim is founded are the same; and 4th, that the character in which the parties sue, or are sued, is the same." It was decided, however, in that case, that where the parties are the same, the thing sought to be recovered is the same, and the character in which the parties sue, or are sued, is the same, the adjudication in the previous suit will be a bar whether the grounds upon which the claim is founded be the same or not: provided the parties could, in the former suit, have brought forward the grounds relied on in the second suit. And in the case of *Leggatt* vs. *Great Northern Railway Co.* (I. Q. B. D. 602), Quain, J., says, "If the issue is the same and the parties are the same, the finding by the jury is conclusive, whether the cause of action is the same or not."

Except, perhaps, the first paragraph this section is merely declaratory of the law as it stood under Act VIII of 1859—*Naranji Bhikabhai* vs. *Dijanmed*, I.L.R., 3 Bom., 3; and should be construed so as to be in harmony with the maxim of general law, *Nemo debet bis vexari pro eadem causa*—*Soorjomonee Dayee* vs. *Sudanund Mohapattar*, L. R. Ind. App. Sup. Vol., 212; 20 W. R., 377; 12 B. L. R., 304; and in regard to this maxim the cause of action must be construed with reference rather to the substance than the form of action—*id.*; *Krishna Behari Roy* vs. *Brojeswari Chowdranee*, L.R., 2 Ind. App. 283; but that general maxim does not require that the plaintiff should assert all his titles to the property at once, and cannot apply where the right on which the suit is brought is not the same as that asserted in the former suit—*Sadaya Pillai*, vs. *Chinni*, I. L. R., 2 Mad., 352; *Buzloor Rahim* vs. *Shamsoonnessa Begum*, 11 Moore, 551; *Ray Kurun Sing* vs. *Fos Ali Khan*, 14 Moore, 187.

If the cause of action is based on a right identical in both suits, or on the same group of facts infringing that right, the second suit is barred—*Haji Hasam* vs. *Ibrahim Mancharam Kaliandas*, I.L.R., 3 Bom., 137.

Where the parties are the same and the title is the same in both suits, but the plots of land sued for are different, the latter suit will be barred as *res judicata*—*Soudhyamla* vs. *Devi Churn Dutt*, 9 C.L.R., 216.

Matter in issue.—Matter in issue may be defined as matter from which either by itself or in connection with other matter, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding necessarily follows (Evid. Act, sec. 3). It is the matter in issue and not the subject matter of the suit that forms the essential test of *res judicata*; thus a decision interpreting an instalment bond is *res judicata* in a suit for a subsequent instalment—*Pahlawan Singh* vs. *Risal Singh*, I.L.R., 4 Alla., 55; *Nirman Singh* vs. *Palwan Singh*, I. L. R., 4 Alla., 65; but though an issue tried is conclusive for certain purposes, yet for other purposes in a suit with a different scope and object it is not so. Thus in a suit between A and B for possession of an estate on proof of title, A set up a family custom to show he was heir of the last owner, and failed. It was held that though A could not set up the same custom to show he was entitled to the estate during B's life time, he could set it up in a suit between them to show he was next heir after death—*Tekait Doorga Prosad Singh* vs. *Tekaitni Doorga Kaonwari*, L.R., 5 Ind. App. 149. So a decision dismissing a suit for partition brought by a son against his father and brother, was held not to bar a subsequent suit between the brothers for partition after the father's death—*Lakhsman Dada Naik* vs. *Naik*, I.L.R., 5 Bom. 48; L.R., 7. Ind. App. 181.

The incidental decision of an issue not raised in the pleadings is not binding—*Shama Churn* vs. *Prosunno Coomar*, 5 C. L. R., 251; and see the cases under *previously heard and determined, post*. In a suit cognizable by a Small Cause Court, such a decision does not estop the parties from raising the same issue in a suit brought to try title—*Inayat Khan* vs. *Rahmat Bibi*, I. L. R., 2 Alla., 97; for the Court has no

power to pass a decree in regard to title, and it is the decree which is the final decision—*Manapka Mudali* vs. *S. T. McCarthy*, I.L.R., 3 Mad., 192 ; and it is not what the Judge may say in his judgment, but what is directed by the decree is *res judicata*—*Mohan Lall* vs. Ram Dyal, I.L.R., 2 Alla., 843; see also *per* Sir Barnes Peacock, in *Soorjomonee Daeree* vs. *Sudanunda Mohapatty*, 12 B.L.R., 304, at p. 308. But in order to determine what the decree really decides, it is essential to see what were the rights which were in dispute between the parties and alleged between them—*Robinson* vs. *Duleep Singh*, 11 Ch. Div., 798, at p 813. Though the decision on an issue be not embodied in the decree, still the parties are bound by it—*Nilamat Khan* vs. *Phadu Buldia*, I.L.R., 6 Cal., 319. See also, *Jopanidhee* vs. *Sahanee*, I.L.R., 5 Cal., 832, at p. 836 ; *Krishna Behari Roy* vs. *Brojeswari Chowdranee*, L.R., 2 Ind. App. 283, at p 284.

No irregularity in the procedure at trial can affect the operation of the final judgment—*Krishna Behari Roy* vs. *Brojeswari Chowdranee*, L.R., 2 Ind. App. 283 ; *Tekait Doorga Persad Singh* vs. *Tekaitni Doorga Konwari*, L. R., 5 Ind. App. at p. 155.

A judgment of a competent Court in accordance with an award incorporates in itself the decision in the award upon the points at issue, and has the same effect as to *res judicata*, as an ordinary judgment of the Court—*Wazir Mahton* vs. *Chuni Singh*, I.L.R., 7 Cal., 727 ; 9 C.L.R., 377.

The Phosphate Co. filed a bill in the English Court of Chancery against Molleson, the trustee of one Lawson, a Scotch Bankrupt, for the recovery of certain moneys on the 19th of April 1873. The bill was amended on the 3rd of March 1874, but the amendment caused no material change in the prayer of the bill as it originally stood. Previously, on the 28th of June 1873, the Company had claimed to prove in the Bankruptcy proceedings in Scotland : the evidence offered was a printed copy of the bill in Chancery ; the claim was rejected. In 1877 the Company again claimed to prove, tendering as proof of their claim a copy of the bill as amended on the 3rd of March 1874. The trustee rejected the proof on the ground of *res judicata*. On appeal to the House of Lords the Lord Chancellor, Earl Cairns, said :—"As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying that 'since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact.' My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, 'I will show that this is a fact which entirely changes the aspect of the case, and I will show you *further*, that it was not, and could not by reasonable diligence, have been ascertained by me before." Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words *res noviter veniens in notitiam*, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a relief which otherwise the parties were not entitled to. But it is unnecessary to dwell upon that, because it is perfectly clear that the Company knew of the additional facts in time to bring them forward in the first proceedings—*Phosphate Sewage Co.* vs. *Molleson*, 4 App. Cas., 801.

Ground of defence or attack in a former suit.—Any matter which might or ought to have been raised in a former suit is considered as decided in it—*Tekait Doorja Pershad* vs. *Tekaitni Doorja Koonwari*, L. R., 5 Ind. App. 149. M sued B to declare her title to property attached. She died while the suit was pending, leaving the property to her sons, who carried on the suit, claiming the property under her will. The lower Court decided the property belonged to M. In second appeal, B successfully contended his debtor was heir to one-fourth of M's estate. The sons did not set up the will. Held, the sons could not raise the will against the purchaser in execution of the debtor's one-fourth—*Sallan Aahmad* vs. *Maula Baksh*, I. L. R., 4 Alla., 21: and see *Srimut Rajah Moottoo Vijaga, &c.* vs. *Katama, Natchiar*, 11 Moore, 50. Where B sued a tenant for rent after a partition, and C intervened and claimed to be entitled to the rent, but did not raise the partition proceedings, it was held he could not sue on them afterward—*Bemolasoondury Chowdhrani* vs. *Punchanun Chowdhry*; I.L.R., 3 Cal., 705 ; and this principle extends to money demands—*Bheeka Lall* vs. *Bhuggoo Lall*, I. L. R., 3 Cal., 23 : but see *Ummatha Cheria Kunhmed*, I. L. R., 4 Mad., 308. And where property of A's husband was conveyed by him to his daughter, and after her death A sued to set aside the deed of gift and obtain the property, it was held she could not sue again for the property

as heir of her daughter—*Denobundhoo Chowdhry* vs. *Kristo Monee Dossee*, I. L. R., 2 Cal., 152. And a decree for possession is binding on persons who intervene claiming to be entitled to such land, but who do not press their claim, and is a bar to their again preferring the claim against any of the parties to the suit - *Sheo Churn Singh* vs. *Fukira Dobey*, 7 C.L.R., 69; I. L. R., 6 Cal., 91. So where a person sued for possession of lands as *towfeer* it was held that she could not subsequently sue for the same as part of her talook—*Woomatara Debia* vs. *Unnopoorna Dossee*, 11 B. L. R. (P. C.), 158; 18 W. R., 162.

Plaintiff's suit was dismissed; on appeal he was not allowed to urge certain grounds which he had not, but might have put forward in the Court of first instance. *Held*, that a subsequent suit based on those grounds was barred as *res judicata*—*Haji Ibrahim* vs. *Mansharam*, I.L.R., 3 Bom., 137; otherwise, if the grounds which the Appellate Court refused to entertain had been raised and decided in the Court of first instance—*Emamooddeen Sowdaghur* vs. *Futteh Ali*, 3 C.L.R., 447. But where plaintiff claimed a parcel of land on the strength of a partition deed which was held invalid, it was held that he was not barred from asking for a partition as a member of a Hindu family in a second suit—*Konerrau* vs. *Garrav*, I. L. R., 5 Bom., 589; *Shivram* vs. *Narayan*, I.L.R., 5 Bom., 27. A suit to have property sold under one decree, does not bar a second to have the same property sold under another decree.—*Radhanath Kanda* vs. *Land Mortgage Bank*, I. L. R., 6 Cal., 559; 8 C. L. R., 10. And the meaning of this clause is that if a person has a matter of attack or defence, and not bringing it forward loses his suit, he is bound as much by the decree as if he had set it up. Thus when A sued B for rent on an agreement, and B denying the agreement pleaded a right of occupancy, and the suit was dismissed for want of proof of the agreement; it was held that the defendant might plead right of occupancy in a suit to eject him—*Ghursobit Ahir* vs. *Ramdut Singh*, I. L. R., 5 Cal., 923; 6 C. L. R., 537. See also the following cases:—*Lalla Luchmun Sahoy* vs. *Ramsaru Pandyain*, 20 W. R., 144; *Brojo Lall Roy* vs. *Khetter Nauth Mitter*, 12 W. R., 55; *Shib Shunkur Neogy* vs. *Huro Soonduree Goopta*, 13 W. R., 209; *Dudsar Bibee* vs. *Shakir Burkandaz*, 15 W. R., 168; *Moonshee Buzloor Ruhum* vs. *Shumsoonissa Begum*, 11 Moore, 551; *Kashee Kishore Roy Chowdry* vs. *Kristo Chunder Sandyal Chowdry*, 22 W. R., 464; the *Shivagunga* case, 11 Moore, 50, 73; *Bhao Singh* vs. *Het Ram*, 7 Alla., 17; *Azgur Mahomed* vs. *Nuzeema Bibee*, 14 W. R., 272; *Mussamut Wafeah* vs. *Mussamut Soneeba*, 8 W. R., 307.

It was held, however, that a suit by a widow to recover certain property under a will of her deceased husband, did not bar a subsequent suit by the same party claiming as heir to her deceased husband—*Mussamut Nousha Begum* vs. *Mussamut Umrao Begum*, 7 Alla., 60; and a suit on a document as a deed of sale has been held not to bar a second suit on it as a mortgage—*Ram Kisto Shah* vs. *Nemy Churn Cholha*, W.R., 1864. And where the ground relied on in the second suit had been brought forward in the first suit, but at too late a stage to be admitted, it was held that the subsequent suit was not barred—*Mussamut Imaman* vs. *Fazul Karim*, 7 Alla., 251; so where it was raised but not decided in the former suit—*Heera Lal Mookerjee* vs. *Dhunput Singh*, I. L. R., 3 Cal., 500.

A previous suit against the same defendant on a bond having been dismissed on the ground that plaintiff had failed to prove the execution of the bond, plaintiff sued to recover the identical sum as a balance due on a khatta account, *held*, the suit was not barred—*Aughore Nauth Ghossal* vs. *Roop Chand Mundul*, 13 W. R., 97. Where A consigned indigo to B who sued A for the balance of an account due him in respect of advances, and the suit was dismissed as no balance was proved due, it was held that the dismissal did not bar a suit by A to recover the proceeds of the indigo—*Punchanun Roy* vs. *Modoosoodun Roy*, W.R. 1864, p. 245.

It has also been held that, where a suit for a right of way is dismissed on the ground that, according to plaintiff's own statement, the road was a public one, a subsequent suit by the same plaintiff against the same defendant to establish a private right of way is not barred—*Nurum Mundul* vs. *Boramdy Sirdar*, 25 W. R., 208; and a suit where the question is as to the right of water in a water course does not bar a subsequent suit contesting the right of the defendants to throw up an embankment—*Hunmohun Sing* vs. *Onuntolall Chowdhry*, W. R., 1864, p. 167. A in possession sued B to establish his right to it, and his suit was dismissed on the ground that he had not proved the mortgage on which he relied, the mortgage deed being unstamped and inadmissible. B then sued A for possession, and the suit was dismissed; in this suit A got his mortgage deed stamped, but it could not be used in the suit as it was filed too late. B then sued to redeem the mortgage, and it was held that the suit was not barred—*Shridhar Vinayak* vs. *Narayan Balad Babaji*, 11 Bom., 224.

A decree declaring that certain land is plaintiff's *mal* land and not defendant's *lakheraj*, is no bar to a subsequent suit for ejectment and *khas* possession—*Ishen Chunder Ghose* vs. *Hurish Chunder Banerjee*, 18 W. R., 99; and a suit for *khas* possession does not bar a subsequent rent suit—*Bhagwan Doss* vs. *Sheo Narain Singh*, 23 W. R., 253. Where the subject matter of the first suit is only a part of the subject matter of the second suit, the first suit creates no bar—*Ram Chunder Chowdry* vs. *Kashee Mohun*, 21 W. R., 57. Whereplaintiff claiming two properties by one and the same title, was dispossessed of these properties by the same parties at different dates, a suit to recover one of the properties is not barred by the failure of a previous suit for the recovery of the other—*Booa Russoolee* vs. *Nawab Nazim of Bengal*, 11 W. R., 382. Plaintiff sued defendant as a trespasser, but it was found he was a tenant and the suit was dismissed: *Held*, that a subsequent suit for ejectment was not barred by the previous suit—*Heera Rawut* vs. *Racha Rawut*, 22 W. R., 115; see, however, *Gopal Kisto Mookerjee* vs. *Mudhosoodun Paul*, W. R. 1864, p. 82. In a suit to recover property which plaintiff had purchased he failed as to a portion which had been previously purchased by one of the defendants, who had a sale certificate thereof: *Held*, that a subsequent suit to set aside the sale would lie—*Choonee Lall Sahoo* vs. *Munnoo Lall*, 13 W. R., 343.

Dismissal of a suit regarding certain land, no evidence being offered or issue raised respecting it will not bar a suit for the recovery of the land against parties who were *pro forma* defendants in the first suit—*Rama Rao* vs. *Sunya Rao*, 3 C. L. R., 265; S.C. reported under the name of the *Zemindar of Pottapuram* vs. *Proprietors of Kolanka*, I.L.R., 2 Mad.,23.; L.R., 5 I. A. 206; but see *Trilochun Chuckerbutti* vs. *Govind Chunder Roy*, 1 Shome, 244. Plaintiff sued to eject his *putnidar* on the ground that the tenancy had determined. While plaintiff's appeal in this case was pending in the Privy Council, he sued to recover for use and occupation, but this suit was dismissed on the ground that plaintiff ought to have sued on the lease; yet it was held that on the dismissal of the appeal by the Privy Council, plaintiff might bring a suit on the lease for rent for the time in respect of which he had previously sued for use and occupation—*Watson* vs. *Dhonendro Chunder Mookerjee*, I. L. R., 3 Cal., 6.

Previously heard and determined.—The Court must exercise its judicial mind and come to a conclusion that one side is right and decide accordingly. It is not *res judicata* if the Court proceeds upon agreement of parties—*Jenkins* vs. *Robertson*, L. R. 1 H. L., Sc., 117; and if an action for a penalty is brought against a person with his consent, so that both parties are really one, or the judgment is obtained by collusion merely to protect defendant, it will not bar another suing for the penalty—*Girdlestone* vs. *Brighton Aquarium Co.*, 4 Ex. Div. 117. See also the case at L. R., 5 Ind. App. 216, referred to above. A judgment expressly excluding a question does not bar a subsequent suit to decide it—*Kanni Lall Khan* vs. *Sashi Bhason Biswas*, I. L. R., 6 Cal., 777; *Nobodeep Chunder Chowdhry* vs. *Brojendro Lall Roy*, I.L.R., 7 Cal., 406. If there has been a final decision on matter directly and substantially in issue, the previous suit will be a bar—*Krishna Behari Roy* vs. *Brojeswari Chowdranee*, Law Rep., 2 Ind. App. 283; 25 W. R., 1.; *Soorjomonee Dossee* vs. *Suddanund Mohapattor*, 12 Ben., 304; 21 W. R., 377; *Mohunt Ajoodhya Doss* vs. *Ajoadhyaram*, 2 Sev., 738; *Nund Kishore Singh* vs. *Hurry Pershad Mundul*, 13 W. R., 64; *Sundhya Mala* vs. *Dabi Churn Dutt*, I.L.R.,6 Cal., 715; though not if there is only a suit pending—*Seal* vs. *Chatterjee*, 1 Taylor,418. And where the matter relied on in the subsequent suit was in issue, but was waived, in the previous suit, the subsequent suit will be barred—The *Shivagunga* case, 11 Moore, 73; see Burge's Col. Law, p. 1114. So where in a previous suit for the same and other property a decree was passed excluding the property, the subsequent suit will be barred—*Mussamut Syudoonissa* vs. *Feda Hossein*, 12 W. R., 182. Where the judgment in the first suit entitles the party to the relief claimed, but this relief is not given in the decree, a subsequent suit for the same relief will be barred—*Bhao Singh* vs. *Het Ram*, 7 Alla., 7. Where a suit is decreed, no subsequent suit will lie on the same ground, even though the decree be not executed; it will be otherwise if it be a decree that cannot be executed, *i.e.*, a declaratory decree—*Ram Jus Rae* vs. *Ram Narain*, 2 Alla., 382, and cases there cited. A suit to set aside an auction sale was dismissed for want of evidence on the part of the plaintiff, with a reservation by the Court that the order made was not to be a bar to the plaintiff or any other person who might substantiate his rights, from proceeding to recover: *Held*, on a fresh suit by the same parties for the same matter that such reservation was of no effect, as under the law then in force the former suit was a bar—*Watson* vs. *Collector of Rajshahye*, 13 Moore, 161: See this case explained in *Emamoodeen Sowdaghur* vs. *Futteh Ali*, 3 C. L. R., 447. See also *Sahadeo Pandey* vs. *Nokhid Pandey*, 5 W. R., 573.

Plaintiffs, having purchased the rights of the widows in certain property, sued the defendants for partition of the share purchased. Defendants admitted the widows' right to a certain extent, but the suit was dismissed on the ground that plaintiffs must establish the extent of their right and the validity of the purchase before they should obtain partition. Plaintiff brought a second suit, and it was held that it being between the same parties, and for the same property, and on the same cause of action, was barred by section 2, Act VIII of 1859; that defendants' admission, though an admission in plaintiffs' favor, gave no new cause of action, and that if the Courts failed to decide all the matters in dispute which they had before them in the former suit, their judgment cannot be revised in a new suit—*Ghasee Khan* vs. *Kulloo*, 1 Agra 142.

Of two pleas the second was only material in case the first should be disallowed. The Court allowed both and dismissed the suit on the first plea. *Held*, that the second was also *res judicata*—*Man Singh* vs. *Narayan Das*, I.L.R., 1 Alla., 481. The amount claimed in a rent suit was admitted, but an issue as to the amount of land leased was raised and decided in plaintiff's favour. *Held*, a bar to a suit by defendant for a declaration as to the amount of land held by him—*Bussun Lal Sukul* vs. *Chunder Das*, 4 C.L.R., 1; but see *Gopee Mohun Mozoomdar* vs. *Hills*, I.L.R., 3 Cal., 789.

Where the defendant appears at the hearing and the suit is dismissed on default, no fresh suit can be brought—*Mofisooddeen* vs. *Shaikh Amooddeen*, 23 W. R., 58. Where a permanent abatement of rent is decided, the question cannot be again litigated during the continuance of the lease—*Nobo Doorga Dossee* vs. *Foyzbun Chowdry*, I. L. R., 1 Cal., 202; 24 W. R. 413, and cases there cited.

Where, however, the cause of action is a continuing one, *e. g.*, an action to compel a mortgagee in possession to account a previous suit will be no bar to a subsequent one—*Roy Dinkur Doyal* vs. *Sheo Golam Singh*, 22 W. R., 172; and where a suit for arrears of rent at enhanced rates is dismissed for want of notice, a subsequent suit is not barred—*Jardine Skinner* vs. *Dwarkanath Chukerbutty*, 14 W. R., 412.

Where a party gets a decree on a joint bond against the parties thereto, he cannot afterwards sue on the bond against others than the parties named therein, on the ground that the latter were the agents of the former—*Nuthoo Lall Chowdry* vs. *Shoukee Lall*, 18 W. R., 458. And a suit against one of several joint promissors on a note bars a subsequent suit against the others—*Kendal* vs. *Hamilton*, 4 App. Cas. 514; *Hemendro Coomar Mullick* vs. *Rajendro Lall*, I.L.R., 3 Cal., 353, and the same rule applies in regard to joint wrong-doers—*Brinsmead* vs. *Harrison*, L.R., 7 C.P., 547; but this rule does not apply where there is no joint liability, as where a principal separately sues two agents to account for money received, and there is an item the same in both suits, the first degree does not bar the second if the amount has been realized—*Lawless* vs. *Calcutta Landing Co.*, I.L.R., 7 Cal., 627; nor where the obligation is joint and several—*Dhunput Sing* vs. *Sham Soonder*, I.L.R., 5 Cal., 291; 4 C.L.R., 501.

Where the previous suit was disposed of in appeal on a purely technical point, a subsequent suit based on the same cause of action will not be barred, even though the previous suit was decided on the merits in the Court of first instance—*Rajah Makond Narain Deo* vs. *Jonardun Dey Burnick*, 15 W.R., 218. A previous suit dismissed for and on the ground of misjoinder or multifariousness—*Futteh Singh* vs. *Mussamut Luchmee Kooer*, 21 W. R., 115; or because all the proper parties had not been joined in it—*Pursun Gopal Paul Chowdhry* vs. *Pooramund Mullick*, 21 W. R., 272; or because one of the defendants was not within the jurisdiction—*Sreeram Mitter* vs. *Nobin Kristo Mookerjee*, 22 W. R., 291; or because neither plaintiff nor defendant appeared at the hearing—*Rughoonath Singh* vs. *Ram Coomar Mondul*, 14 W. R., 82; or because there was a discrepancy between the plaint and the plaintiff's statement—*Gunga Narain* vs. *Punchanance Dossee*, W.R., 1864, p. 163; is no bar to a subsequent suit. And even the fact that the matter relied on in the subsequent suit was determined in a previous suit will not bar a subsequent suit, unless the matter was properly in issue in the previous suit—*Moni Roy* vs. *Mussamut Rajbunsee Kooer*, 25 W.R., 393; *Salahmunissa Khatoon* vs. *Mohesh Chunder Roy*, 16 W. R., 85. No part of the reasoning on the findings of fact, which have induced the Court to come to its decision, is binding as between the parties further than for the purposes of the particular decision—*Aukhil Chunder Mookerjee* vs. *Shib Narain Ghose*, 15 W.R., 527; nor will an adverse opinion incidentally expressed in the judgment in a previous suit bar a subsequent suit—*Chowdhry Mahomed Momin* vs. *Latafut Hossein*, 13 W. R., 239; *Shib Nath Chatterjee* vs. *Nobo Kishen Chatterjee*, 121 W. R. 89. An affirmation in general terms of the rights of the plaintiff in a suit, those rights being based in some measure on documents, does not preclude the defendants from raising the question as to the genuineness of the docu-

ments in a subsequent suit between the same parties—*Hurrehur Mookerjee* vs. *Ooma Moyee Dossia*, 12 W. R., 525.

Erroneous dismissal of a suit or application for execution on a point of limitation will not bar a subsequent suit or application—*Brindabun Chunder* vs. *Dhomanjoy Laskar*, 4 C. L. R., 443; *Delhi and London Bank* vs. *Orchard*, 1. L. R., 3 Cal., 47. Dismissal of a suit because plaintiff did not produce the Collector's certificate required by Act XXIII of 1871, does not bar a subsequent suit—*Patali Meheti* vs. *Tulja*, I.L.R., 3 Bom., 226: and see *Pattarary* vs. *Audimla*, 5 Mad., 419.

A suit was brought for possession of certain land and for mesne profits. It was dismissed, and the plaintiff appealed only as to the right to obtain possession, and obtained a decree from the Appellate Court. He afterwards brought a suit for mesne profits. It was held that that suit was not barred by section 2, or section 7, or section 196 of Act VIII of 1859, nor by section 11 of Act XXIII of 1861, which applied only to the amount of mesne profits, and not to the right to receive them—*Pratap Chandra Burua* vs. *Rani Swarnomayi*, 4 B. L. R. (F. B.), 113; 13 W. R. (F. B.), 15.

A suit for mesne profits will lie after a suit for possession, if in that suit no question of mesne profits was raised or decided—*Protab Chandra Burua* vs. *Rani Swarnomayi*, 3 B. L. R. App. 81. Where in a suit for possession of land with mesne profits, a decree was given for mesne profits from the date of the institution of the suit to the date of recovery of possession only, a second suit cannot be brought for mesne profits for the period preceding the institution of the first suit. The plaintiff should not have allowed the previous decree to remain if he considered himself to be entitled to further mesne profits—*Luteefoonissa Beebee* vs. *Luckeemonee Dossee*, Marsh, 93.

Where a suit for confirmation of possession and declaration of title has been dismissed in final appeal on the ground that the plaintiff had not proved his possession, the question of title is still open in a suit for the recovery of the land instituted by the defendant in the former suit—*Gunga Bishen Bhugut* vs. *Raghu Nath Ojah*, 9 C.L.R., 34.

Where the matter relied on in the subsequent suit was not decided, but expressly reserved in the decree in the prior suit—*Syud Mobarruk Hossein* vs. *Sheo Gobind Misser*, 18 W. R., 61; or reserved with the assent of the parties, or has been expressly excluded from decision or has not been decided—*Roghoonath Mundle* vs. *Juggut Bundhoo Bose*, I.L.R., 7 Cal., 214; or was not intended to be decided—*Pudma Coomari Debi* vs. *Court of Wards*, L. R., 8 Ind. App. 237; *Raja Sheoraj Nundun Singh* vs. *Rajcoomar Baboo Deo Nundun Singh*, 24 W. R., 23; the subsequent suit will not he barred. A decision as to the validity of a will under the provisions of Act XXVII of 1861 will not bar a regular suit between the same parties to contest the validity of the will—*Anund Chunder Mitter* vs. *Baney Madhub Mitter*, 1 W. R., 127. Where A brought a suit against B relying on the allegation that B was not heir, and the suit was dismissed on the ground that A did not prove his case, in a subsequent suit brought by B against A on the ground that B was heir, it was held that the decree in the previous suit was not conclusive evidence of that fact—*Gooroo Churn Sircar* vs. *Brija Nath Duhr*, 24 W. R., 111.

Where a plea of *res judicata* is set aside and a suit admitted by a Judge, his successor has no authority to re-open the question; but he should, under any circumstances, record his opinion on the merits *Salvhmunissa Khatoon* vs. *Mohesh Chunder Roy*, 16 W. R., 85.

In some cases a suit may lie to execute a decree in consequence of circumstances which happened after it was made. But a suit will not lie to execute a decree on the ground of circumstances happening before the decree was pronounced, and to which the plaintiff was a party—*Sheik Hossein Buksh* vs. *Sheikh Musund Hossein*, 18 W. R., 261.

A judgment for a statutory penalty will not bar a subsequent action for the same penalty by another plaintiff if it appear that the first judgment was obtained at the instance of the defendants and for their protection—*Girdlestrne* vs. *Brighton Aquarium Co.*, 4 Exch. D. 1 07. A obtained a decree against B for a portion of the land claimed in his plaint. B offered to give A possession of a larger amount of land than he obtained by his decree on condition that A should not appeal, and A agreed. A, however, did appeal and obtained a decree under which he got possession of a quantity of land larger than that given by the agreement. *Held*, that the agreement was valid, and that a subsequent suit for recovery of the land in excess of the agreement, was not barried as being *res judicata*—*Jati Ram* vs. *Dass Ram*, 3 C.L.R., 574.

The parties must be the same.—It is not necessary that the parties to the subsequent suit should have been the original parties to the previous suit. If they have become adverse parties by intervention or otherwise, and the matter has been tried and determined between them, a subsequent suit will be barred—*Krishna Behari Roy* vs. *Brojisswari Chowdrain*, L. R., 2 Ind. App., 283; 25 W. R., 1; otherwise, not—*Ain*

Ali vs. *Juggut Chunder Roy Chowdhry*, 25 W. R., 416. Where a suit seeking a declaration of *ijmali* was dismissed, it was held that a subsequent suit by the same plaintiff for a *butwarra* as against the defendants in the previous suit and others not in possession was barred—*Shaikh Beshharutoollah* vs. *Shaikh Ajoo*, 14 W. R., 195. A decree against a *shebait* is binding on his successors—*Golab Chand Baboo* vs. *Prossuno Coomarec Debia*, 20 W. R., 86; see also *Khusalchand* vs. *Mahadevgiri*, 2 Bom., 214. A decision against a Hindu widow that certain property was not the self-acquired property of her husband bars the heirs in reversion after the widow—*Nund Kumar* vs. *Radha Kuari*, I. L. R., 1 Alla., 283, and the beneficial owner is bound by the result of a suit brought by him in the name of his *benamdar*—*Khubchand* vs. *Narain Singh*, I. L. R., 3 Alla., 812; but see *Kalee Prosunno Bose* vs. *Denonath Ghose Mullick*, 19 W. R., 434.

A purchaser under a mortgage decree is not bound by a decree obtained in a suit instituted against the mortgagor subsequent to the date of the mortgage—*Bonomalee Nag* vs. *Koylash Chunder Dey*, I. L. R., 4 Cal., 692; and a purchaser at a Revenue auction-sale is not bound by decrees obtained against the former owner in respect of the lands purchased—*Narain Chunder* vs. *Taylor*, 3 C. L. R., 151.

A decision in a suit does not conclude any question between the defendants in that suit—*Obhoy Churn Nundee* vs. *Bhoobun Mohun Mojoomdar*, 12 W. R., 524; *Kalee Kinkur Bachusputty* vs. *Kristo Mungul*, 11 W. R., 462; *Khelut Chunder Ghose* vs. *Kishen Gobind Deb*; *Nabin Chunder Mojoomdar* vs. *Mookta Soondurce Dabia*, 15 W. R., 309, 7 B. L. R., App. 38; *Ain Ali* vs. *Juggut Chunder Roy Chowdry*, 25 W. R., 4 6; unless it is a judgment *in rem*.—The *Shivagunga* case, 9 Moore, 539; or a suit for partition—*Khoorshed Hossein* vs. *Nubbee Fatima*, I. L. R., 3 Cal., 551, but see *Shadal Khan* vs. *Amenallah Khan*, I. L. R., 4 Alla., 92; and *Bissorup Gossami* vs. *Gorachand Gossamy Doss*, sec., App., No. 2235, dated 3rd May, 1882, where the *pro forma* defendants adduced evidence in support of plaintiff's case. A suit against A for rent in which B was joined as a nominal defendant, does not bar a subsequent suit against B as surety for A—*Ramtuno Acharjee* vs. *Radha Gobind*, 11 W. R., 407. A previous decision against one member of a family, suing to recover his own share of certain property, is no bar to a suit by the Receiver in the name of the whole family to recover the whole property—*Juggonath Pershad Dutt* vs. *Hogg*, 12 W. R., 117; nor to a subsequent suit by another member of the family—*Jogendro Deb Roy Kut* vs. *Funindro Deb Roy Kut*, 4 Moore, 367. A suit by reversioners against a childless widow is no bar to a suit by the same *plaintiffs*, after the death of the widow, to obtain possession of the same lands held by defendant as the alleged adopted son of the widow—*Mohan Lall Bhaya Gyal* vs. *Luchmun Gyal*, 14 W. R., 73. A suit to set aside a *pottah* as fabricated is not barred by the fact that the same *pottah* was found genuine in a suit for rent against the same defendant by a *ticcadar* of the plaintiff—*Shaikh Wahid Ali* vs. *Nath Toorahoo*, 24 W. R., 128. Where the name of the intervenor in a suit was ordered to be struck off the record, but by mistake was not, a subsequent suit by the intervenor will not be barred—*Kalee Coomar Dutt Roy* vs. *Pran Kishore Chowdrain*, 18 W. R., 29; nor will a subsequent suit be barred where the decree expressly reserves all questions as between the intervenor and the plaintiff in the second suit—*Sayad Mobaruck Hossein* vs. *Sheo Gobind Missur*, 18 W. R., 61. In one case it has been held that a suit is not barred by reason of a prior suit decided against plaintiff's father while plaintiff was a minor, in which the father was sued in his personal capacity, on the ground that the plaintiff was not a party to the first suit, either actually or by representation—*Raj Dollub Sircar* vs. *Ooma Churn Biswas*, 21 W. R., 109.

A brought a suit for possession of certain land against B. The suit was dismissed, but this decision was reversed by the High Court. B appealed to the Privy Council. While this appeal was pending, C intervened saying that he had bought A's interest, and praying to be admitted as a respondent. The Privy Council admitted C as a respondent, and at the hearing reversed the decision of the High Court and dismissed the suit. In a subsequent suit, held, that as between C and A's representatives the title to the land was *res judicata*—*Belchambers* vs. *Ashotosh Dhur*, 7 C. L. R., 308.

An award as to the apportionment of compensation under Act X of 1870, is final and binding on the parties in whose presence it is passed—*Nilmony Singh* vs. *Ram Bundhu Roy*, 3 C. L. R., 211. Is a decision under the Land Acquisition Act *res judicata*, in respect of the title to portions of the property not taken up under the Act?—*Nobodip Chunder Chowdhry* vs. *Brojendro Lall Roy*, 9 C. L. R., 117; I. L. R., 7 Cal., 406. The dismissal of an application under section 63 of Act II of 1874, bars the making of a subsequent one—*Smith* vs. *Secretary of State*, I. L. R., 3 Cal., 340; otherwise with an application made under Act IX of 1860—*Nenalo* vs. *Nawal*, I. L. R., 1 Alla., 428.

Court of competent jurisdiction.—If the matter in issue has been heard and determined in a previous suit between the same parties in a Court *not* of competent jurisdiction, the subsequent suit will not be barred—*Poholi Mullick*

vs. *Fukeer Chunder Patnaik*, 22 W. R., 349; *Chunder Narain Mojoomdar* vs. *Prithanund Asrum*, 12 W. R., 290; *Mussamut Rance Gonesh Kooer* vs. *Mussamut Oomdutnessa Begum*, 6 Alla., 77; *Kalka Pershad* vs. *Kanhaya Singh*, 7 Alla., 99. An inferior Court has jurisdiction to try every matter which is necessary for the adjudication of the point which is in contest before it, whether it involves interest of the largest values or the smallest, but such decision is only final as regards matters within his pecuniary jurisdiction. If the Court is without jurisdiction the subsequent suit will not be barred, even though it was the plaintiff's fault that the Court had not jurisdiction—*Petali Meheti* vs. *Tulja*, I. L. R., 3 Bom., 223. So it has been held that if the suit is barred, the decision is not binding—*Bindabun Chunder Sircar* vs. *Dhununjoy Nashkur*, I. L. R., 5 Cal., 246. It is not a final adjudication for the decision of other facts which are not in contest before it—*Tekaitnee Goura Coomaree* vs. *The Bengal Coal Company*, 13 W. R., 129, and cases there cited. Dismissal of a rent-suit or of a suit for damages for trespass in a Small Cause Court does not bar a subsequent suit to try the title—*Inyat Khan* vs. *Rahmut Bibi*, I. L. R., 2 Alla., 97; *Doorga Ram Paul* vs. *Kally Kristo Paul*, 3 C. L. R., 549.

Execution proceedings.—The decision of a dispute under section 367 as to who should represent a deceased plaintiff is not binding in a regular suit—*Abedoonissa* vs. *Ameeroonissa*, L. R., 4 Ind. App. 66. See note under section 232, post. And the order of a Court in an execution proceeding, declining to enter into an application to execute, is not *res judicata*—*Delhi and London Bank* vs. *Orchard*, L. R., 4 Ind. App. 127, 131; *Huro Sundari* vs. *Juggubundhoo Dutt*, 7 C. L. R., 61; but a decision declaring, though erroneously, that an application for execution is not barred is final—*Mungul Pershad Dichit* vs. *Girja Kant Lahiri*, L. R., 8 Ind. App. 123; *Manjanath Badra Dhat* vs. *Venkalish Govind Shanbhog*, I. L. R., 6 Bom., 55; but see *Rupkuari* vs. *Ram Kripal Shukul*, I. L. R., 3 Alla., 141, and a construction put upon a decree in execution is binding—*Kali Mundul* vs. *Kader Nath Chukerbutty*, 6 C. L. R. 215; *Huro Sundari* vs. *Juggobundhoo Dutt*, 7 C. L. R., 61.

Criminal Courts.—See note under section 11, *ante*. The decision of a Criminal Court that A had abducted B is not conclusive in a civil action raising the same question between A and B's father—*Ram Lal* vs. *Tula Ram*, I. L. R., 4 Alla., 97. The adjudication by a Magistrate that a street is a highway does not bar a regular suit to declare it is private property.—See the *Queen* vs. *Hutchins*, 6 Q. B. Div. 300; but his decision as to possession under section 530 C. P. Code is final—*Lillu* vs. *Annaji*, I. L. R., 5 Bom., 387.

Revenue Courts.—Inasmuch as the principles upon which the section is based are maxims of general equity, suits under Act X of 1859 should be governed by those principles—*Purbhoo Tewaree* vs. *Ramjewan Patuck*, 1 Alla., 119. An application under Act X of 1859, section 15, is not a suit, and does not bar a subsequent suit—*Ramnarain Mitter* vs. *Nobin Chunder Moordafarash*, 18 W. R., 208. Revenue Courts under Act X of 1859 were Courts of limited jurisdiction to try summary suits for the recovery of rent, and could not make binding declarations of right, or finally determine questions of title (see *Hurree Sunker Mookerjee* vs. *Kristo Pattro*, 24 W. R., 154; thus where the Collector declared the plaintiff was entitled to assess rent upon land alleged by the defendant to be *lakheraj*, it was held not to be conclusive between the parties in a subsequent suit between the same parties under Act VIII (B.C.) of 1869—*Hurree Sunkur Mookerjee* vs. *Mukhtaram Pattro* 15 B. L. R., 238; *Hurree Sunker Mookerjee* vs. *Kristo Pattro*, 24 W. R., 154. So where A sued B for rent on the allegation that B was his outbundee ryot and got a decree, it was held not to bar B from suing in the Civil Courts for a declaration that he held the lease from the zemindar and not from A—*Dhonaye Mundul* vs. *Arif Mundul*, 9 W. R., 306.

On a question as to whether the decision of a Revenue Court on an application under cl. (*n*) sec. 95 of Act XVIII of 1873 bars a subsequent suit in the Civil Court to try the title, a Full Bench of the Allahabad High Court were evenly divided—*Shumbhu Narain Singh* vs. *Bachcha*, I. L. R., 2 Alla., 200. The action taken by the Revenue authorities under Act IX of 1847, in regard to a settlement, though final, will not bar a proprietor from bringing a suit in the Civil Court to have it declared that he alone is entitled to hold the property under the settlement—*Narain Chunder Chowdhry* vs. *Taylor*, 3 C. L. R., 151. A decision on both under sections 8 and 9, Act XIX of 1863, is binding—*Har Sahai Mal* vs. *Maharij*, I. L. R., 2 Alla., 294; but not a decision not finding or declaring the rights of parties, but depending on a previous decision erroneously considered binding—*Asghar Ali* vs. *Jharda*, I.L.R., 2 Alla., 839.

Where, for the purposes of a rent suit, a Revenue Court finds that a *kubooleut* propounded by the plaintiff is a genuine document, such finding is no bar to a Civil

Court trying the question of right between the parties, and for that purpose trying the validity and genuineness of the *kubooleut*—*Boistub Churn Sein* vs. *Trahee Ram Sein*, 15 W. R., 32; *Ram Dhone Ghose* vs. *Ishan Chunder Ghose*, 18 W. R., 31. So the decision of a Revenue Court that a party is liable for rent does not prevent the latter from suing for a declaration of title—*Jodoonath Sein* vs. *Ram Coomar Chatterjee*, 9 W. R., 359. The Revenue Courts have, however, in some cases, power to determine questions of title—*Ecshooree Singh* vs. *Emma Hunter*, 2 Alla., 53.

When a ryot sued his landlord for possession and based his suit on a *mourasi* lease, and the Deputy Collector, holding the *mourasi* lease to be genuine, decided the right to possession, it was held, in a subsequent suit between the same parties for a declaration that the *mourasi* lease was spurious, that the decision of the Deputy Collector was not conclusive between the parties—*Chunder Coomar Mundul* vs. *Numni Khanum*, 11 B.L.R., 434; 19 W. R.,322; so, where the Collector decided on the genuineness of an *ikrarnamah* in a rent suit, it was held not binding between the parties in a subsequent civil suit—*Khugowlee Sing* vs. *Hossein Bux Khan*, 7 B. L. R., 673; *Bhyro Sing* vs. *Oodee Kurn Sing*, 12 W. R., 284; and where a Collector in a rent suit incidentally decided a question of *mokurrari* title, it was not deemed conclusive—*Meer Babur Ali* vs. *Sheikh Dowlut Ali*, 15 B. L. R., 242, note. And it is the same in the North-West, under Act XVIII of 1873—*Hossein Shah* vs. *Gopal Rai*, 1. L. R., 2 Alla., 428. Such decisions would be admissible in evidence under sections 11 and 15 of the Evidence Act.—See *Hurree Sunkur Mookerjee* vs. *Kristo Patro*, 24 W. R., 154. The Revenue Courts have been held not competent to try a question of benamee and equitable liability arising out of a suit for rent where the relation of landlord and tenant was clearly and distinctly denied—*Hurish Chunder Roy* vs. *Poorno Soonduree Debee*, 18 W. R., 36; *id.*, 125.

The decision of a Civil Court under Act VIII (B. C.) of 1869 is conclusive between the same parties. Thus, where in a suit for rent the Court decided the land was not *lakheraj* but *mal*, it was held that the decision was final on the question of title—*Mohima Chunder Mozoomdar* vs. *Asradha Dassia*, 15 B. L. R., 251, note. And a decision in a rent suit that an intervenor has no right to the rent, will bar a subsequent suit brought by him to try the title—*Bemola Soondury* vs. *Punchanun*, I. L. R., 3 Cal., 705; *Gobind Chunder Kondoo* vs. *Taruck Chunder Bose*, I. L. R., 3 Cal., 145; 1 C. L. R., 35; and if in a suit for ejectment defendant pleads an *istemarari* title and the issue is found against him, he cannot again raise it—*Denomoye Dabia* vs. *Anungo Moyo*, 4 C. L. R., 599. So where a tenant in a rent suit claimed to hold 8 beeghas of land and it was decided he only held 4, the decision was *resjudicata*—*Bussun Lal Sukul* vs. *Chundi Das*, 4 C. L. R., 1. And in a suit to enhance, where the tenant pleaded want of notice and that the tenure was not liable to enhancement, and the Judge decided that the tenure was liable to enhancement but dismissed the suit for want of notice, and no mention of the liability to enhancement was made in the *decree*. *Held*, defendant could not in a subsequent suit raise the question of non-liability to enhancement—*Niamut Khan* vs. *Bhadu Buldeo*, I. L. R., 6 Cal., 319; 7 C. L. R., 227; but the dismissal of a suit under section 27, Act VIII of 1869 (B. C.) does not create an estoppel—*Brindabun Chunder Sircar* vs. *Dhananjoy Luskur*, 4 C. L. R., 443. A sued B for rent. C intervened on the ground that he was entitled to the rent of the property and failed to establish his claim. A suit for possession on proof of title by C was held to be barred—*Gobind Chunder Koondoo* vs. *Taruck Chunder Bose*, I. L. R., 3 Cal., 145; *Run Bahadoor Singh* vs. *Lucho Kooer*, I. L. R., 6 Cal., 416. But a suit for arrears of rent at a particular rate is no bar to a suit by the tenant for abatement—*Roghu Nath Mondul* vs. *Jugutbundhu Bose*, 8 C. L. R., 393.

Final Decision, Exp. IV.—An *ex parte* decree is not final, so long as it is open to the Court on the application of the parties to modify it—*Nilmoni Singh Deo* vs. *Hira Lal Das*, 8 C. L. R., 257; I. L. R., 7 Cal., 23; *Bhagirath Paloni* vs. *Ram Lochun Deb*, I. L. R., 8 Cal., 275; but the decision of a case remanded in appeal though heard *ex parte* by the Privy Council is *res-judicata* of every thing which might have been raised and determined in it—*Juggodumba Dassee* vs. *Tarakant Banerjee*, 6 C. L. R., 121. When the judgment of a Court on any particular issue is appealed against, it ceases to be *res judicata* and becomes *res subjudice*, and if the Appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the first Court on that issue is no bar—*Nilvaru* vs. *Nilvaru*, I. L. R., 6 Bom., 110.

Explanation V.—This Explanation only applies to cases where several persons claim a right under a common title. Thus, where B sued A to have it declared that he had a right to build a wall over a certain drain and it failed to prove a prescriptive right of user set up by him, it was held not to bar a subsequent suit by C against B for a prescriptive right of user in regard to his homestead—*Kali Shunkur Dass* vs.

Gopal Chunder Dutt, I. L. R., 6 Cal., 49. And this Explanation would not make a judgment against one co-sharer in a property binding on the others—*Hazir Gazi* vs. *Sonamonee* Dassee, I. L. R., 6 Cal., 31; *Kristinaji* vs. *Sitaram*, I. L. R., 5 Bom., 496; but this section seems not restricted by section 30, post, so a decree against a *Karnavan* of a Malabar tarwad is binding upon all the members, though not parties, in the absence of fraud or collusion—*Varankot Narayanan Namburi* vs. *Namburi*, I. L. R., 2 Mad., 328. Where A sued B for a parcel of land, and obtained a decree, and subsequently C and D, nephews of B, sued A and B for their shares alleging collusion in the previous suit, and it was found that B and C and D lived together as members of an undivided Hindu family; *Held*, as collusion was not proved, nor minority during the previous suit asserted, that C and D were fully represented by their kurta B in the previous suit, and that decision was conclusive—*Narayan Gop Habbu* vs. *Pandurang*, I. L. R., 5 Bom., 685. See also *Jogendro Deb Roy Kut* vs. *Funendro*, 14 Moore, 376.

When foreign judgment no bar to suit in British India.

14. No foreign judgment shall operate as a bar to a suit in British India—

(*a*) if it has not been given on the merits of the case:

(*b*) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India:

(*c*) if it is in the opinion of the Court before which it is produced contrary to natural justice:

(*d*) if it has been obtained by fraud:

(*e*) if it sustains a claim founded on a breach of any law in force in British India.

This section applies to H. C. and M. S. C. C.

The judgment of a foreign Court obtained on a decree in British India, is no bar to execution of the original decree—*Fakuruddeen Mahomed* vs. *The Official Trustee*, I. L. R., 7 Cal., 82.

The mere fact that a suit is pending in a foreign Court at the time the suit is instituted in this country is no bar—*The Delta*, 1 P. D., 393; *Seal* vs. *Chatterjee*, 1 Taylor, 418. A foreign judgment on matters of form only will not bar a suit in this country on the merits—*The Delta*, 1 P. D., 393; nor will an *ex parte* decree against a native of British India, on a cause of action arising in British India—*Hinde* vs. *Ponnath Brayun*, I. L. R., 4 Mad., 359. An action cannot be maintained on the decree of a foreign Court against the drawer of a bill neither domiciled resident, nor possessing property in the foreign State, who is found to have casually resorted thither and drawn the bill for a sum found due to his creditor—*Mathappi Chetti* vs. *Chillappa Chetti*, I.L. R., 1 Mad., 196.

The rule in Story is that foreign judgments, in order to be binding, must have finally determined the matters in dispute, and must be an adjudication upon the actual merits: they may be impeached on the ground that the foreign Courts had no jurisdiction, whether over the cause, over the subject matter, or over the parties, or that the defendant never was summoned to answer or had an opportunity of making his defence, or that the judgment was fraudulently obtained. This was adopted by the Calcutta High Court—*Sreehuree Bukshee* vs. *Gopal Chunder Samunt*, 15 W. R., 500; *Bolaram Gooy* vs. *Kameenee Dossee*, 4 W. R., 108. A suit was brought against the defendants in the French Court at Mahe, and they made no objection to the jurisdiction of the Court, but appeared and defended the suit, which was decreed against them. In a suit upon the decree of the French Court the defendants pleaded that it had been passed without jurisdiction as they had always lived in British Territory: *Held*, by the Madras High Court, that the defendants having taken the chance of a judgment in their favour, which would, if obtained, have relieved them from all liability, they were equitably estopped from afterwards pleading want of jurisdiction—*Kandoth Mammi* vs. *Neelancherayil Abdu Kalandan*, 8 Mad., 14. See also *Khandasami Pillai* vs. *Moidin Saheb*, I. L. R., 2 Mad., 337. But if a party, sued in a foreign Court not having jurisdiction, protest against the jurisdiction, he does not voluntarily submit, although he may have appealed from the decision of the first Court without repeating his objection, and the judgment cannot be sued upon in British India—*Parry & Co.* vs. *Pillai*, I. L. R., 2 Mad., 407.

No suit is maintainable founded upon the judgment of a Court of a native state. Such judgment can only be enforced as provided by section 434 of the Code of Civil Procedure—*Bhavanishanker Shevakram* vs. *Pursadri Kalidas*, I. L. R., 6 Bom., 292.

For the effect of contracts for the compounding of criminal offences against the law of a foreign country, see *Subraya Pillai* vs. *Subraya Mudali* (4 Mad., 14.) As to irregularity in procedure or limitation in a foreign country, see *Nallatambi Mudaliar* vs. *Pillai*, I. L. R., 2 Mad., 400.

(*b*) This is clearly not the law of England. See *Goddard* vs. *Gray*, L. R., 6 Q. B., 139.

CHAPTER II.

OF THE PLACE OF SUING.

Court in which suit to be instituted.

15. Every suit shall be instituted in the Court of the lowest grade competent to try it.

This section applies to H. C. and M. S. C. C.

Court of the lowest grade competent.—By section 12 of the Letters Patent the High Court of Calcutta has not jurisdiction, where the "debt, damage, or value of the property sued for does not exceed 100 rupees," and it has been held that the *bonâ fide* nature of the claim and not the decree determines the jurisdiction. Thus, where a person sued *bonâ fide* to recover 843 rupees damages, in the High Court, and through defective proof failed to obtain a larger amount than 75 rupees, it was held that the High Court had jurisdiction—*Sikhur Chund* vs. *Sooring Mull*, 1 Hyde, 272; but a person cannot give a Court jurisdiction in such a case by adding on to his claim sums which he could not recover, was not entitled to, and which he added simply to give jurisdiction—*Bonmally Nawn* vs. *T. Campbell*, 19 W. R., 20; or sums which he did not claim in the suit—*Mooloo* vs. *Verapah Chetty*, 17 W. R., 243. But the mere fact that a suit has been over valued does not deprive the Court in which the suit is brought of jurisdiction, if the over-valuation was *bonâ fide*, and had not the effect of altering the appellate jurisdiction—*Rajendro Lall Gossami* vs. *Shama Churn*, I. L. R., 5 Cal., 188.

It is the money value of the original suit that fixes the jurisdiction of the Courts throughout the subsequent litigation in its several stages, not the value of what has been left in dispute—*Muthasami Pillai* vs. *Muthu Chidambara Chetti*, 7 Mad., 356; *Dooly Chund* vs. *Nirban Singh*, 18 W. R., 262. Thus where a person sought to recover one instalment of a bond conditioned for the payment of Rs. 500 per month, and secured by a penalty of Rs. 50,000, the suit was held to be within the jurisdiction of the Small Cause Court of Calcutta—*Smith* vs. *Sims*, Gaspar 145; and a Munsif has jurisdiction in a suit for money not exceeding Rs. 1,000 charged on land, although the value of the land is greater, such land lying within the local Courts of his jurisdiction—*Janki Das* vs. *Badri Nath*, I. L. R., 2 Alla., 698.

Valuation of Suit.—By sections 19 and 20, Act VI, 1871, the jurisdiction of District Judges and Subordinate Judges extends, subject to Act VIII. of 1859, Section 6, (corresponding to the present section), to *all* original suits, that of Munsifs to all such suits in which the subject-matter in dispute does not exceed one thousand rupees; and by section 22 an appeal lies to the District Judge where the amount or value of the subject-matter in dispute (in the original suit—*Nogendro Chunder Mitter* vs. *Kishen Soondery Dossee*, 19 W. R., 133, 137-8) does not exceed Rs. 5,000. The valuation of a suit for the purposes of stamp duty, and the valuation of the subject-matter of the suit for the purpose of determining the jurisdiction of the Court are two different things. Thus an appeal to a District Judge against a decree in a suit for property of the value of more than Rs. 5,000 will be set aside in special appeal, though the valuation for the purpose of stamp duty may have been less than Rs. 5,000, and though the first appeal may have been heard by consent of the parties—*Aukhil Chunder Sen* vs. *Mohini Mohun Dass*, 4 C. L. R., 491.

Over-value.—As regards over-value, this section refers to procedure only, and regulates the practice of the Courts, but does not deprive any Court of Jurisdiction which it may otherwise possess. Thus, where a Subordinate Judge entertained a suit contrary to this section, the High Court held that it was a mere irregularity which did not prejudice the appellant, and refused to enter on the question of valuation with a view to determine in what Court the suit should have been brought—*Russick Chunder Mohunt* vs. *Ram Lall Shaha*, 22 W. R., 301. So, where the first Appellate Court dismissed a suit on the ground that the subject-matter of the suit being less than a thousand rupees, the suit should have been brought in the Munsif's Court, and that the Subordinate Judge had acted without jurisdiction in trying it; the High Court decided, that, under Act VI, 871, section 19, the Subordidate Judge was empowered to try *causes of any value*, and although he should, if he had found the value of the subject of the suit to be under a thousand rupees, have sent it to the Munsif, still the fact that he tried it himself was no ground for error in special appeal—*Safeeoollah Sircar* vs. *Begum Bibi*, 25 W. R., 219. So it has been held that the fact of a suit decreed by a Subordinate Judge for less than a thousand rupees being cognizable by a

Munsif's Court was no ground for dismissing it; but the plaintiff should not be allowed more costs than if he had sued in the lower Court—*Joy Kishen Doss* vs. *J. N. Turnbull*, 24 W. R., 137; and see *Masaoolah Khan* vs. *Ram Lall*, I. L. R., 6 Cal., 6.

Under-Value.—But if a suit is under-valued and taken into the wrong Court it is otherwise—*Russick Chunder Mohunt* vs. *Ram Lall Shaha*, 22 W. R., 301 unless the objector is equitably estopped, or has delayed in raising the objection. Plaintiff applied before a Subordinate Judge to sue in *forma pauperis*, and was met by the plea of over-valuation; and the Subordinate Judge, holding that the suit was over-valued, declined to entertain it. Subsequently, he obtained a decree before the Munsif, and defendant appealing, raised the objection of valuation, and the suit was dismissed, as beyond the Munsif's competency to try; *Held*, this decision was wrong, that the defendant could not turn round and object to the jurisdiction of the Munsif, since it was on his opposition that the original application had been rejected—*Bromo Moyee Dasias*. vs. *Anund Chunder Chatterjee*, 22 W. R., 120. Plaintiff's suit was dismissed by a Munsif as above his jurisdiction. He appealed; the Court of Appeal, reversing the Munsif's decision, directed him to try the suit; he did so and dismissed it, but on appeal plaintiff obtained a decree. In special appeal defendant again raised the question, but it was ruled that he was not entitled to do so. The Court held "the objection as to jurisdiction cannot be taken at this stage of the case; the appellant had a right to come up here in special appeal from the order passed on the 14th of June, 1872 .....This question of jurisdiction has no bearing upon the merits, and simply refers to the form in which a suit should be brought"—*Koylash Chunder Ghose* vs. *Shaik Asraf Ali*, 22 W. R., 101. This decision goes a great length; defendant did not come into Court willingly, and plaintiff had no equity against him; he had a perfect right not to appeal till final decree, and the Munsif had, under Act VI, 1871, section 19, only jurisdiction up to one thousand rupees.

Small Cause Court.—When a Munsif is vested with powers up to fifty rupees under Act VI of 1871, and there is a Court of Small Causes, under Act XI, 1865, with jurisdiction extending to five hundred rupees, at the same place, a suit of the nature cognizable by Small Cause Courts, if not above fifty rupees in value, should be brought in the Munsif's Court—*Dwarkanath Dutt* vs. *Bhathu Hawoldar*, 22 W. R., 457. Compare Act VI. of 1871 with Act XI. of 1865, section 12. This does not apply to village Munsifs established in Madras under Regulation IV, 1816, section 5, to try suits not exceeding ten rupees, and in such cases the Munsifs and Small Cause Courts possess *concurrent* jurisdiction, and one does not exclude the other—*Parasoorama Pillay* vs. *Coolla Ramasawmy*, 5 Mad., 45.

Court Closed.—By section 5, Limitation Act, 1877, if the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, prosecuted or made on the day that the Court re-opens.

Jurisdiction of Small Cause Courts.—The nature of the relief sought, and not the nature of the defence, or evidence, determines the jurisdiction. A Small Cause Court has jurisdiction to try a suit to recover money which plaintiff had paid in order to save his tenure from sale by defendants (plaintiff alleging he had previously paid the rent)—*Krishna Kishore Shaha* vs. *Bireshur Mozoomdar*, I.L.R., 4 Cal., 595; 3 C.L.R. 177; or a suit for expenses incurred by a gomashtah over and above the amount of rents collected, though the nature of the defence may render it necessary to investigate the accounts of the mehal—*Prosunno Chunder Roy* vs. *Sreenath Sremanee*, 7 W. R., 422; or for the balance of an account though it may be necessary to enquire into items beyond jurisdiction—*Ewart & Co.* vs. *Haji Mahomed Sadik*, 4 Bom., 133; or for an amount within its jurisdiction on a bond which is beyond it—*Suke Monee Debia* vs. *Hurry Mohun Mookerjee*, 6 W. R., Ref., 6; or for the balance of a debt beyond jurisdiction, where the debt has been reduced by payment to an amount within it—*Boyle* vs. *Turner*, Gaspar, 17; or where the defence renders it necessary to determine the amount paid under an assignment—*Mohima Chunder Mookerjee* vs. *Ram Churn Roy*, 6 W. R., Ref., 16; or for grain in the nature of rent which has fallen due, though the whole amount payable from first to last under the agreement would be in excess of its jurisdiction—*Narasidavur* vs. *Madana Kaundan*, 2 Mad., 440; *Samam Tewari* vs. *Sakina Bibi*, I. L. R., 3 Alla., 87; or for damages arising from the re-sale of goods, though the original contract was for a sum beyond jurisdiction—*W. Kappu Chetti* vs. *C. Chidambara Mudali*, 3 Mad., 170; or for money on a mortgage bond—*Doorkya Roy* vs. *Dulsingar Singh*, 12 W. R., 367, though the plaint may contain a prayer for foreclosure and sale in default of payment—*Khettro Mohan Chatterjee* vs. *Kesori Mohan Bose*, 1 B. L. R., 27, unless the debt must be primarily enforced against real property—*Atmaram B. Kaji* vs. *Sadashiv Mahajani*, 2 Bom., 1; or for damages or an order to fill up an excavation, there being no ground for the latter kind of relief sought—*Nund Coomar Banerjee* vs. *Ishan Chunder Banerjee*, 10 W. R., 130; 1 B. L. R., 91; or for damages for breaking down a wall, when the defendant pleaded purchase and plaintiff replied that the sale was invalid as made by a Hindu widow without necessity—*Shumbhoo Chunder Mullick* vs. *Pran Kisto Mullick*, 13 W. R., 105.

In Madras a different rule prevails, and if it reasonably appear to the Judge that a *bonâ fide* question of right which is not within his jurisdiction has been fairly raised, he is bound to dismiss the suit—*Ammallu Ammal* vs. *Subbu Vadiyar*, 2 Mad., 184; but see *Alagirisami Naiker* vs. *Inuasi Udayan*, I. L. R., 3 Mad. 127. So in a suit for rent where the defendant set up that plaintiff's title to the land had passed to others since the creation of the tenancy, it was held that the suit should have been dismissed for want of jurisdiction—*D. Venkata Chalam* vs. *Thimma Naikan*, 5 Mad., 64.

A Small Cause Court can entertain a suit against municipal commissioners—*Hurrish Chunder Taluputter* vs. *O'Brien*, 14 W. R., 248; to recover damage on account of illegal removal of crops—*Daur Sinha* vs. *Rugh Nundun Sinha*, 3 Alla., 101; *Ram Jebun Koyee* vs. *Shahasadee Begum*, 9 W. R., 336; or money collected from an estate by parties under an obligation to pay it to the plaintiff—*Bhugobutty Churn Bajpaye* vs. *Sharoda Pershad Sooku*, 22 W. R., 298; or the value of a tree destroyed and fish taken out of a tank—*Sujjad Ali* vs. *Bhola Ram*, 5 Alla., 24; or damages for money paid under a fraudulent misrepresentation—*Fatema Begum* vs. *Syed Moosa*, 8 W. R., 128; or damages sustained in consequence of the decree-holder fraudulently omitting to certify to the Court payments made on a decree—*Bhugoban Tuntee* vs. *Gobind Chunder Roy*, 9 W. R., 210; or the price paid as damages in consequence of a vendor failing to complete a little to land—*Charoo Khan* vs. *Doorga Monee*, 9 W. R., 498; or maintenance payable under a special contract—*Paupamma* vs. *Venkata Reddy*, 5 Mad., 432; *Sidlingapa* vs. *Sidava*, I. L. R., 2 Bom., 624; *Apaji Chintaman* vs. *Gangabai*, I. L. R., 2 Bom., 632: or damages against a person refusing to quit the land or pay rent—*Bhoobun Mohun Bose* vs. *Chunder Nath Banerjee*, 17 W. R., 69 or damages for defamation of character, where actual loss has resulted—*Gunga Narain Moytro* vs. *Gudadhur Chowdry*, 13 W. R., 434; or damages under the Copyright Act (see Act XI. of 1865; Sec. 2, Act IX. of 1850)—*Jadoonath Mullick* vs. *Jawarally*, 1 Gaspar 185 (but not since the passing of Act XII of 1876—*Hameedoollah in re*, I. L. R., 6 Cal., 499); or for the fruit upon trees or damages in lieu thereof—*Nasir Khan* vs. *Karamat Khan*, I. L. R., 3 Alla., 168; or for damages for malicious prosecution—*Debi Singh* vs. *Hanuman Upadhya*, I. L. R., 3 Alla., 747.

A person claiming damages for personal injury where actual pecuniary damage has resulted, has a right to join in the suit another part of the claim to damages which is not cognizable by a Small Cause Court—*Mansing Lalung* vs. *Theram Doloye*, 19 W. R., 395; *Gunga Narayan Moytro* vs. *Gudhadhur Chowdhry*, 13 W. R., 434.

A Small Cause Court can entertain a suit to recover a share of a boat—*Mahomed Azan Bhuyah* vs. *Mahomed Somee*, 21 W. R., 413; or moveable property of which the owner has been dispossessed by an attachment order—*Janakeammal* vs. *Vithnadien*, 5 Mad., 191; *Radha Kishen* vs. *Chotey Lall*, 3 Alla., 155; *Shiboo Narain Singh* vs. *Mudden Ally*, I. L. R., 7 Cal., 608; or thatch severed from a house—*Raj Coomar Mookerjee* vs. *Prannath Mookerjee*, 15 W. R., 499. If one of two sharers sells joint moveable property without the other's consent, the latter can sue the purchaser in a Small Cause Court for the price of his share—*Radhanath Shaha* vs. *Kameenee Soonderee Dossee*, 2 W. R., 37. It can take cognizance of a suit to recover an unaccounted for balance in the hands of an agent—*Jooghul Kishore Roy* vs. *Rughoo Nath Seal*, 20 W. R., 4; or money in the hands of a third person to which the plaintiff is entitled—*Sunkur Lall Pattuck Gyawul* vs. *Mussamut Ram Kally Dhamin*, 18 W. R., 104; *Lasmonee Debia* vs. *Mahomed Haferzulla*, 3 B. L. R., App., 96; or money paid to be applied in satisfaction of a decree and not so applied by the decree-holder—*Tarinee Churn Roy* vs. *Gopal Kishto Roy* 2 W. R., Ref., 5; or money paid in excess of the proper share—*Joynarain Manger* vs. *Muddoo Soodun Goraet*, 2 W. R., 134 (but see the case of *Ram Bux* vs. *Moodhoo Soodon Pal Chowdhry*, 7 W. R., 377); or *mesne* profits—*Kakaji Sakharam* vs. *Govind Ganesh*, 8 Bom., 96; or to file an award—*Bridge* vs. *Edalji Mancharji*, 10 Bom., 54; *Elam Puramanick* vs. *Sefaetullah Sheikh*, 10 W. R., 85; or for wages against a European British subject.—*Mirza Rumzan Beg* vs. *Cook*, 14 W. R., 428.) One joint decree-holder may sue the other in a Small Cause Court for his share of the execution sale proceeds—*Mata Prasad* vs. *Isauri*, 1. L. R. 3 Alla., 59; but not if the suit would involve questions of partnership account—*Ramtonu Acharjee* vs. *Peary Mohun Acharjee*, I. L. R., 6 Cal., 551.

A Small Cause Court cannot entertain a suit for salvage, though the property saved has been abandoned by those who had charge of it—*Kishore Singh* vs. *Gunnesh Mookerjee*, 9 W. R., 252; nor to establish a judgment-debtor's title in moveable property and have it sold—*Shiboo Narain Singh* vs. *Mudden Ally*, I. L. R., 7 Cal., 608; *Balmokund* vs. *Lekraj*, 3 Alla., 156; *Ram Dhun Biswas* vs. *Kefal Biswas*, 10 W. R., 141; *Radha Kishen* vs. *Chotey Lall*, 3 Alla., 155; *Moossden Gazee* vs. *Dinobundho Gossamee*, 13 W. R., 99; *Jethabhai Bhai Chand* vs. *Bai Lakhu*, 6 Bom, 27; (but a suit will lie to establish plaintiff's right in moveables attached in execution against a third party—*Jankiammal* vs. *Vithnadien*, 5 Mad., 191); nor to recover money due on a bond, and a declaration of plaintiff's lien on the mortgaged property—*Ram Narayan Mookerjee* vs. *Srimati Saroda Debi*, 6 B. L. R., App., 39; nor to ascertain what is due on a mortgage and to make the property available for realizing the amount—*Ram Gopal Shah* vs. *Ram Gopal Shah*, 9 W. R., 136—(otherwise in Madras—*Appahu Pillai* vs. *Subraya Muppeen*, 2 Mad., 474); nor to recover possession of mortgaged moveables on paying the amount ascertained to be due—*Bhubotarinee Ghosany* vs. *Jaggernath Tewary*, 16 W. R., 58; nor to declare a person's title as heir and give consequential relief—*Kola Aheer* vs. *Mussamut Lajna Aheimur*, 3 Alla., 105; nor to obtain property as a share of an intestacy—*Grish Chunder Singh* vs. *Auna Dossee*, 17 W. R., 46; *Nobin Chunder Gossamee* vs. *Dribo Moyee Debee*, *id.*, 520; nor to recover a tree unsevered—*Shanthi Lakshmin Arasamna* vs. *Vepa Venkatramadas*, 3 Mad., 237; nor standing huts purchased under a decree—*Rohiny Kunt Ghose* vs. *Mahabharut Nag*, 10 W. R., 258; nor a suit for damages recoverable under section 98, Act VIII, 1869 (B. C.)—*Meer Hyder Ali* vs. *Shaikh Jafar Ali*, 24 W. R., 222; nor to recover money paid to prevent plaintiff's land being sold for arrears of rent, plaintiff asserting none were due—*Shaunkara Subbien* vs. *Vallayan Chetty*, 5 Mad., 179; nor for damages arising out of acts done under colour of exercising the power to distrain under the rent laws—*Joyloll Sheikh* vs.

Brijonath Paul Chowdhry, 9 W. R., 162; nor for defamation of character not resulting in any pecuniary loss—*Bhyrub Chunder Chuckerbutty* vs. *Mohendro Chuckerbutty*, 13 W. R., 118, or where the pecuniary loss is not pleaded—*Rajchunder Chuckerbutty* vs. *Punchanun Surmah Chowdry*, 4 W. R., 7; nor for damages for false complaint—*Prankristo Banerjee* vs. *Nuddear Chand Chatterjee*, 10 W. R., 115, except when special pecuniary loss has resulted from it—*Sitaraman* vs. *Susa Pillai*, 2 Mad., 254; *Durga Pershad* vs. *Asa Tolaha*, I. L. R., 5 Cal., 925; nor an action against a military officer in a military cantonment when there is a Court of Requests—*Aboo Sail* vs. *Arnott*, 2 Mad., 439, though the fact of being a soldier is no bar to an action—*Marwady Baja Rajoo* vs. *Haynes*, 6 Mad., 83; nor a suit for contribution—*Ram Bax* vs. *Modhoo Soodhun Paul Chowdry*, 7 W. R., 377; *Modhoo Soodhun Mozoomdar* vs. *Bindoo Basheni*, 6 W. R., Ref., 15; *Bromopoor Goswamee* vs. *Pran Nath Chowdhry*, 7; W. R., 17; *Ramtonu* vs. *Peary Mohun*, I. L. R., 6 Cal., 551; *Nobin Krishna Chakravati* vs. *Ram Kumar Chakravati*, I.L. R., 7 Cal., 605; nor to recover money paid under an order of Court—*Grish Chunder Mundul* vs. *Doorga Dass*, I. L. R., 5 Cal., 494; nor to recover money paid in mistake by A in liquidation of a debt due by B—*Itche Moyee Dossee* vs. *Bama Soonduree Dossee*, 25 W. R., 73 (otherwise in Madras—*Govinda Muneya Tiruyan* vs. *Bapu*, 5 Mad., 200; *Parasurama* vs. *Krist Nayan*, 5 Mad, 462); nor for maintenance by a Hindu widow—*Mussamut Hema Kooeree* vs. *Ajoodhya Pershad*, 24 W. R., 474; *Nobin Kali Debea* vs *Bindoobashiny Debea*, 5 W. R., Ref., 5 (unless the obligation to pay the maintenance arises under a special contract—*Sidlingapa* vs. *Sidava*, I. L. R., 2 Bom., 624, which special contract should be alleged in the plaint—*Apaji Chintaman* vs. *Gangabai*, I. L. R.; 2 Bom., 632); nor a suit for maintenance on an award—*Durjan Singh* vs. *Mussamut Sibia*, 7 Alla., 329, *Mussamut Guneshee* vs. *Chotay Lal*, 3 Alla., 117, or fixed by a decree of Court—*Pahlud Singh* vs. *Ahlud Sing*, 6 Alla., 91; *Kaminee Dossee* vs. *Chunder Bishonath Shaha*, 9 W. R. 214; *Nobin Kalee Debea* vs. *Bindoobashenee Debea*, 5 W. R., Ref., 5; *Kameenee Dossee* vs. *Bishonath Shaha*, 9. W. R., 214; but see *Bugwan Chunder Bose* vs. *Binodo Bashinee Dossee*, 6 W. R., 286; nor a suit by principal against his agent for adjustment of account—*Krishna Kinker Roy* vs. *Madhub Chunder Chuckerbutty*, 21 W. R., 283; nor for specific performance of a contract—*Nilkanth Surmah* vs. *Bishen Bashee*, 6 W. R., 322; nor to declare that a bond has been satisfied and is inoperative—*Agur Mullick Mundul* vs. *Debnath Chatterjee*, 24 W. R., 190; nor to recover the unsatisfied balance of a decree of such Court—*Sandes* vs. *Jomir Shaikh*, 9 W. R., 399; nor to set aside a decree of Court as illegal and collusive—*Bama Soonduree Debee* vs. *Kaminee Bewa*, 10 W. R., 352; nor is a suit to obtain an order from the Court that a decree upon a mortgage of a certain house should be enforced against the person and property of the defendant who had purchased the house at auction subject to plaintiff's mortgage, but had subsequently removed the materials of the same, and so deprived the plaintiff of his lien thereon, cognizable by a Court of Small Causes—*Omer Kurim* vs. *Shewan Lall*, 4 C. L. R., 291.

Small Cause Court—Rent Suits.—A Small Cause Court has jurisdiction in a suit for the rent of land where the principal subject of the entire occupation is *bastoo* land, the residue (if any) being merely subordinate; but it is otherwise if the principal subject of the entire occupation is agricultural land, and the buildings are mere accessories—*Mussamut Ranee Chundessuree* vs. *Gheenah Pundey*, 24 W. R., 152; *Gokul Chund Chatterjee* vs. *Mosahroo Kandoo*, 21 W. R., 5; *Pearee Bewa* vs. *Nokoor Kurmokur*, 19 W. R., 308; also in a suit for money for the use of land—*Wooma Pershad Shaw* vs. *Shumsher*, 4 W. R., Ref., 10 *Brice* vs. *Toogood*, 5 W. R., Ref., 18; *Buchoo Chowbey* vs. *Ghoorlait*, 4 Alla., 56; on a *kistbundee* given for arrears of rent—*Rajah Shutt Churn Ghosal* vs. *Gopal Kisto Roy*, 2 W. R., Ref., 5; on an agreement to let out trees and appropriate their produce—*Deb Nath Ghose* vs. *Pachoo Mollah*, 6 W. R., Ref., 8; for dâk expenses according to a patni lease—*Dheraj Mahtab Chand* vs. *Radha Benode Chowdhry*, 8 W. R., 517; *Erskine* vs. *Trilochun Chatterjee*, 9 W. R., 518; on an agreement to hold land for a term in connection with money lent, to realise the rents, take credit for interest, and pay the excess to plaintiff—*Nobinchunder Vodro* vs. *Kedar Nath Chuckerbutty*, 16 W. R., 228; or against a cultivator when the cultivator is a servant and not a ryot—*Sree Nath Dutt* vs. *Dwarry Dhallie*, 2 W. R., Ref., 2; but not to entertain suits to enhance the rent of *bastoo* land which must be instituted in the ordinary Courts—*Ranee Doorga Soonduree Dassee* vs. *Bibi Oondutoonissa*, 18 W. R., 284; *Joy Kishore Chowdrain* vs. *Nubee Buksh*, 17 W. R., 178; nor to recover the amount of a trade impost claimed from all the members of a certain trade—*Jagherdar of Arnee* vs. *Perriyanna Mudely*, 5 Mad., 317; not to recover arrears of choukedari cess entered in a wajib-al-arz—*Kasim Ali* vs. *Shadee*, 3 Alla., 21; nor to decide the title to land, where plaintiff fails to prove an agreement to pay rent—*Khudeeram Biswas* vs. *Koral Budoonee Dossee*, 21 W. R., 379.

North-West—Under Act XVIII, 1873, a suit for possession of a holding, by a tenant against his landlord, should be instituted in the Revenue Courts—*Muazzim Ali Khan* vs. *Sheo Pershad*, 7 Alla., 259; and in a suit to eject a tenant holding over, the Civil Courts will not have jurisdiction even if the suit for ejectment is combined with a claim for mesne profits—*Ram Autar Rai* vs. *Mussamut Talimundi*, 7 Alla., 49; but this Act does not preclude the Civil Courts from taking cognizance of a suit to recover possession, on the averment that the plaintiffs were occupancy ryots, with mesne profits against third persons setting up an adverse title—*Mata Pershad* vs. *Janki*, 7 Alla., 226; *Raghobar Misser* vs. *Sital id.*, 228; nor of a suit to recover possession of *sir* land on the ground that defendants had taken possession without any right—*Mussamut Ghisa* vs. *Dedari*, 7 Alla., 257.

Bengal.—By Act VIII (B. C.) of 1869, Revenue Courts were abolished, and the trial of rent suits was made over to the ordinary Civil Courts. The question of jurisdiction cannot therefore arise. It has been held that a Court is not justified in dismissing a suit wrongly instituted under Act VIII (B.C.) of 1869, if it could give relief under the ordinary procedure—*Jullalooddeen* vs. *Burne*, 18 W. R., 99; *Gobind Mahtoon* vs. *Ram Khelawun Singh*, 22 W. R., 478; if necessary it should allow the plaint to be amended—*Gobind Chunder Bose* vs. *Bykunt Nath Ghose*, 19 W. R., 61. A suit for enhancement not cognizable under the rent law may be brought under the ordinary Procedure—*Coomar Poresh Narain Roy* vs. Watson, 3 C. L. R., 543.

Assam.—As to Act X of 1859, being in force in Assam, see *Hootaboo Ravah* vs. *Loom Ravah*, I. L. R., 7 Cal., 440; *Kumood Narain Bhoop* vs. *Purna Chunder Roy*, I. L. R., 4 Cal., 547.

Objections to Jurisdiction.—Where jurisdiction is newly given by statute its exercise must be carried out strictly in the manner prescribed—*Hudson* vs. *Tooth*, 3 Q. B D., 46. A Court cannot try a cause where there is no jurisdiction, if it did it would be nothing more than a private arbitrator—1 Morton, 119, *Sreemutty Lalmoney Dassee* vs *Juddoonauth Shaw*, 1 Ind. J. (N.S.), 319; and submission by the defendant cannot oust the jurisdiction of the Appellate Court to set the decision aside—*id.*, note—*Roy Bhopendro Nath Chowdhry* vs. *Kalee Prosunno Ghose*, 24 W. R., 205; *Government* vs. *Ran Malsinghji Amar Singhji*, 9 Bom., 242, *Aukhil Chunder Sen* vs. *Mohini Mohun Dos*, 4 C. L. R., 491, *Foster* vs. *Underwood* 3 Ex. Div., 1; but it has been held in England that where a judge acts *ultra vires* by consent no appeal lies—*White* vs. *Buccleuch*, L. R., 1 H. L., Sc. 70; though if the person who is cast by the decision succeeds in first appeal, he can not object to a second appeal—*Bickett* vs. *Morris*, L. R. 1 H. L. Sc. 47. When an objection to jurisdiction is raised and allowed at an early stage of the case, the plaint should be returned to be presented in the proper Court—*Khoosal Chund* vs. *Palmer*, 2 Agra, 280; even though the suit may have been registered—*Khandu Moreshvar* vs. *Shivji bin Gorkoji*, 5 Bom., 212; *Kavasji Framji* vs. *Wallace*, 1 Bom., 113. If the objection is not raised till a later stage, if the jurisdiction is doubtful, the proper course is to proceed and determine the suit—*Bagram* vs. *Moses and Gasper*, 1 Hyde, 284. When no objection to the jurisdiction of the first Court was raised in the grounds of appeal, and the first Appellate Court declined to hear the question argued, it was held that the objection should have been considered and decided—*Motilal Ram Dass* vs. *Jamnadas Javerdas*, 2 Bom., 40. Such objections should be taken as early as possible, or the party raising them may find himself equitably estopped. Upon attachment in execution of decree, the judgment-debtor prayed for time and agreed in his petition that, if he did not satisfy the debt within a stated period, the property might be sold; it was held that he could not raise the question of jurisdiction in appeal—*Radha Gobind Gosami* vs. *Ooma Sunduree Dassia*, 24 W. R., 363. Where special appellant allowed the Lower Court without objection to decide an appeal, it was held he could not object to jurisdiction in special appeal—*Hurish Chunder Roy* vs. *Poorna Soondaree Debee*, 18 W. R., 36. So where special appellant objected to jurisdiction in the first Court, but took no such objection in regular appeal, it was held that he could not do so before the High Court—*Mahomed Hossein* vs. *Rajah Akhaya Narian Paul*, 2 B. L. R., App., 42. So where plaintiff sued for rent, obtained a partial decree, and appealed, it was held that, though the Civil Court had not jurisdiction yet the plaintiff having acquiesced in the jurisdiction of the Court, the decree might stand—*Teekum Lall Doss* vs. *McArthur*, 1 W. R., 279. So where a decree was passed and executed in a Revenue Court, and in execution the creditor purchased his debtor's property, the judgment-creditor carried on the case before the Collector and the Commissioner in appeal; held, he could not sue to set aside the sale on the ground of want of jurisdiction of the Revenue Court—*Ooma Soonduree Dassee* vs. *Bepin Behary Roy*, 18 W. R., 292; and so, after years of litigation in execution proceedings, the Court of first instance was held to be justified in refusing, in a suit brought to have errors in those proceedings corrected, to raise an issue as to the jurisdiction of the Court to entertain those proceedings—*Nehora Roy* vs. *Radha Pershad Singh*, 4 C. L. R., 353.

So where a decree had been obtained for a certain sum of money without interest, and afterwards a kistbundi was filed by which the judgment-debtor agreed that the amount of the decree should be paid by instalments with interest, and the judgment-debtor had by his conduct for years treated it as a decree, it was held that the debtor could not plead a want of jurisdiction to execute the kistbundi and insist on a regular suit being brought on it—*Denonath Sen* vs. *Guru Churn Pal*, 14 B. L. R., 287.

As to costs when the plea of no jurisdiction is allowed in special appeal, see *Moonshee Aftab Ooddeen* vs. *Mohini Mohun Dass*, 15 W. R., 48.

Generally the plea of want of jurisdiction will not be listened to in special appeal if not raised in the Courts below, unless it arises clearly upon the pleadings or from the admissions of the parties—*Nymooddee Jourdar* vs. *Moncrieff*, 12 W. R., 140; 3 B. L. R., 283. But if a party protests against jurisdiction, he is not bound to retire, and can go through the case subject to the protest—*Hamly* vs. *Belleuey* 6 Q. B. Div., 63. As to the distinction between jurisdiction and irregularity, see *Dale's case*, 6 Q. B. Div., 376, at pp. 396, 406, 415, 417.

The distinction between entire absence of jurisdiction and the inability of certain persons who are equitably estopped from pleading an irregular exercise of jurisdiction seems to have been lost sight of in several cases in the High Court at Calcutta, viz., *Madhub Chunder Dunput* vs. *Madhub Lall Khan*, 14 B. L. R., 288; *Kanhyalal Pundit* vs. *Collector of Cuttack*, id., 291; *Ram Runjun Chuckerbutty*, vs. *Rajah Johurujumah*

Khan, 23 W.R., 129; *Roy Bhoopendro Nath Chowdry* vs. *Kalee Prosunno Ghose*, 24 W. R., 205. In *Ekouri Sing* vs. *Bijaynath Chattapadya*, 4 B. L. R. (A. C.), 114, *Markby, J.*, said :—" The only point upon which I have felt the smallest doubt is as to whether or no the conduct of the defendant in the subsequent suit in having, as I think it is pretty clear he had, concluded that *mesne* profits were given in the first suit could in any way affect the position of the parties. But upon consideration, I think it clear that it could not. I think it is a clear principle of law that parties cannot either by special agreement or by any conduct of their own, invoke the process of the Court in execution. Process in execution must always be granted by the direct act of the Court itself. And it appears to me that precisely upon the same principle that parties are prohibited from invoking the process of the Court *de novo*, either by agreement or by their conduct, they are also prohibited from extending in like manner the relief which the Court has chosen to award. Therefore, all questions as to the conduct of parties where they are seeking to execute a decree of the Court are, in my opinion, immaterial, in considering what is the effect of the decree." In *Sadasiva Pillai* vs. *Ramalinga Pillai*, 15 B. L. R., 383, their Lordships of the Privy Council referring to a question of *mesne* profits under a decree held as follows :—" Upon the whole, their Lordships are of opinion that the respondent did come under an obligation to account in this suit for the subsequent *mesne* profits of the appellant's land which was capable of being enforced by proceedings in execution, notwithstanding the construction of the 11th section of the Act of 1861 which now prevails in Madras. They conceive that this liability made the 'accounting 'a question relating to the execution of the decree' within the meaning of the latter clause of the section. But even if it did not, they think that upon the ordinary principles of estoppel, the respondent cannot now be heard to say that the *mesne* profits in question are not payable under the decree, nor do they feel pressed by the observations made by Mr. Justice Markby in the case reported in the 4 B. L. R., A. C. J., p. 113. The Court here had general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani* vs. *Attorney-General of Gibraltar*, in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiae*." See also *Pisani* vs. *Attorney-General for Gibraltar*, L. R., 5 P. C., 516, referred to above; *Brooks* vs. *Wigg*, 8 Ch. Div., 510; *Jakharuddin Mahomed Ahsan* vs. *The Officiating Trustee*, L. R., 8 Ind. App. 197; *Khemna Gowala* vs. *Budoloo Khan*, I. L. R., 6 Cal., 251. Courts have no jurisdiction to interfere with the public property of a foreign sovereign though he may have submitted to the jurisdiction of the Court for the purpose of enabling the Court to order the property to be delivered over to him—*Vavasseur* vs. *Krupp*, 9 Ch. Div. 351.

In *Revell* vs. *Blake*, L. R., 7 C. P., 300, 8 C. P., 533; which was an interpleader suit to have an adjudication declared a nullity as made without jurisdiction, the Kent County Court adjudicated one Maxwell a bankrupt. The petition had described him as residing within the jurisdiction of the Court, and " not carrying on business within the jurisdiction of the London Bankruptcy Court;" for otherwise the latter Court alone could, under section 59 of the Bankruptcy Act of 1869, make the adjudication. It turned out afterwards that Maxwell did in reality carry on business in London within the jurisdiction of the London Brankruptcy Court (which was unknown to the petitioning creditor and to the Kent County Court), and the question was, what effect had that fact on the adjudication made by the Kent County Court. The majority of the Court of common pleas held that as on the facts which were before the County Court, the adjudication made was correct, and one which the Court would be bound to make, it was not rendered null by the fact that the Court had come to a wrong conclusion that the bankrupt had not traded in London; *Bovill*, C. J., saying:—" In ordinary cases where the jurisdiction of an inferior tribunal, as of Magistrates at Petty Sessions, depends on some fact into which it is their duty to inquire as essential to this jurisdiction, the determination of that tribunal after *bonâ fide* investigation as to such fact is conclusive as to the existence of jurisdictions so far as that fact was concerned, see *Reg* vs. *Bolton*, L. R., 1. Q. B., 66; *Mould* vs. *Williams*, L. R., 5 Q. B., 469." On appeal to the Exchequer Chamber the whole Court were unanimouls that under the Bankruptcy Act of 1869 each County Court has a general jurisdiction in Bankruptcy as part of one General Court of record, that therefore the adjudication was merely an irregular exercise of jurisdiction the remedy for which was an appeal, and that the question as to the effect of want of jurisdiction did not really arise. On this latter point *Blackburn*, J., said :—" It was thought by *Brett*, J. in the Court below, that the County Court could only have jurisdiction if the debtor resided within the district, and did not reside or carry on business in the London district. And it was argued, that the general rule applied to this case, which is applicable to inferior Courts with a limited jurisdiction, *viz.*, that where such Court exceeds the limits of its jurisdiction, the proceedings are void, and may be shewn to be so in any collateral proceeding. If it were so, and the local Courts of Bankruptcy were inferior Courts, these consequences might follow, however inconvenient they might be. I do not, however, think that such is the effect of the Act."

As to objections to jurisdiction on the ground that the officer whose act is impugned was not properly appointed or was disqualified, see *Glyn* vs. *Bonnaud*, 2 Taylor and Bell, 205, 224, and cases there cited. Acts done by Justices, in a judicial character, have in no instance been thought invalid—*Margate Pier Co.* vs. *Hannan*, 3 B. and Ald., 271;—*Addison on Torts*, p. 691.

16. Subject to the pecuniary or other limitations prescribed by any law, suits

Suits to be instituted where subject-matter situate.

(*a*) for the recovery of immoveable property,

(*b*) for the partition of immoveable property,

(*c*) for the foreclosure or redemption of a mortgage of immoveable property,

(*d*) for the determination of any other right to or interest in immoveable property,

(*e*) for compensation for wrong to immoveable property,

(*f*) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section "property" means property situate in British India.

This section applies to M. S. C. C.

Immoveable Property.—By section 12 of the Charter of 1865, the High Court has jurisdiction in the case of suits for land or other immoveable property, situated within the local limits of its original jurisdiction, and under this section it has been held that suits for foreclosure or redemption of land—*Bibee Jaun* vs. *Meerza Mahomed Hadee*, 1 I. J., N. S., 40; *Sreemutty Lalmoney Dossee* vs. *Juddoo Nauth Shaw*, id., 319; *Ramdhone Mullick* vs. *Blackquire, The Englishman*, September 11th, 1865; for the recovery of a mortgage debt and in default of payment for sale of the mortgaged land—*In re Leslie's Petition* 9, B. L. R., 171 (see all these cases referred to in *Juggodumba Dossee* vs. *Puddomoney Dassee*, 15 B. L. R., 326); against a receiver in possession of lands after the mortgage had foreclosed, asking for an account and to redeem—*Denonath Sreemoney* vs. *C. S. Hogg*, 1 Hyde, 141; against trustees to carry out the terms of a trust deed executed by A for himself and B, and compel the sale of lands outside Calcutta, where B denied A's authority to act for him—*Dehli Bank* vs. *Wordie*, I. L. R., 1 Cal., 249; 25 W. R., 272, have been considered "suits for land."

A suit to recover title deeds of property situate without Calcutta is not a suit for land within the meaning of clause 12 of the Letters Patent—*Juggernath Doss* vs. *Brijnauth Doss*, I. L. R., 4 Cal., 322; 3 C. L. R., 375.

By section 5, Act VIII, 1859, "suits for land or immoveable property" should be instituted in the Court within whose jurisdiction it is situated: *Held*, a suit for the recovery of a mortgage debt by sale of the mortgaged property is not a suit for land within this section, and that a suit for land is a suit which asks for delivery of the land to the plaintiff—*Yenkoba Balshet Kasar* vs. *Rambhaji Arjun*, 9 Bom., 12. It seems to be otherwise in Bengal. In the matter of *S. J. Leslie*, 18 W. R., 269; 9 B. L. R., 171, Markby, J., said:—"I think that the plaint so far as it asks for a sale of the mortgaged property in satisfaction of the mortgage debt, is a "suit for land" within the meaning of section 5 of the Code of Civil Procedure which regulates the jurisdiction in this case. Mr. Branson contended that these words should be read as signifying these suits alone in

which the land itself is sought directly to be recovered. It was admitted that a much wider construction had been put by Mr. Justice Macpherson upon the similar words of the Charter of the High Court; that learned Judge holding that a suit for foreclosure by the mortgagee was as such a suit for land (1 Ind. Jur., N. S., 40), and that a suit for redemption was so also (1 Ind. Jur., N. S., 319), but it was contended that these decisions were not correct. We see no reason to suppose this. They have never been questioned so far as we are aware. On the contrary the uniform practice of the Court on its original side has been in accordance with them." But see observations of Garth, C. J., in *Delhi and London Bank* vs. *Wordie*, I. R. L., 1 Cal., at p. 257.

A Court has power to give a decree for mortgaged property situate within its jurisdiction though the mortgage of which redemption is sought includes property without the jurisdiction—*Gerdhari* vs. *Sheo Raj*, I. L. R., 1 Alla., 431; and see *Bolaka Lall* vs. *Thakoor Perlam Sing*, I. L. R., 5 Cal., 928.

But the High Court cannot decree specific performance of an agreement to mortgage lands in the Mofussil, if the parties do not reside in Calcutta—*Sree Nath Roy* vs. *Cally Dass Ghose*, I. L. R., 5 Cal., 82; nor partition family property of which the moveable portion is within and the immoveable portion without the original jurisdiction—*Jairam Narayan Raj* vs. *Ataram Narayan Raj*, I. L. R., 4 Bom., 482.

Interest in immoveable property.—A suit for possession and for opening a water-course is a suit for an interest in immoveable property—*Oodoyessurre* vs. *Hurokishore Dutt*, 4 W. R., 107. So is a suit to enforce a contract of hypothecation pledging certain land for payment of the amount borrowed, and providing that on non-payment in three years the land should become the absolute property of the pledge—*Chettigundan* vs. *Sandaram Pillai*, 2 Mad., 51; *Raja Kaundan* vs. *Muttammah*, 3 Mad., 92. So also is a suit brought to enforce payment of principal and interest both as a simple contract liability and as a debt secured by a collateral mortgage of immoveable property—*A. Kristna Row* vs. *H. Hachapa Sugapa*, 2 Mad., 307. So is a suit for a declaration that lands are mortgaged or charged with a debt and to have them sold in execution, notwithstanding a later disposition—*Surwan Hossein* vs. *Shahazadah Gholam Mahomed*, 9 W. R., 170; *Koonj Beharee Lall* vs. *Ram Narain*, 2 Agra, 244; *Ram Lall Mookerjee* vs. *Chittro Coomaree*, 15 W. R., 277. So is a suit for a sum of money, where plaintiff asked that the decree should be enforced against the person of the borrower and the property pledged—*Munoo Lall* vs. *Pigue*, 10 W. R., 379. And so is a suit to enforce in plaintiff's favour an assignment of rent not due but to become due at the time of the assignment—*Hall*, ex parte, *Whitting*, in re. 10 Ch. D., 615. And in a suit on a mortgage and money bond in a district other than where the property is situated, the Courts have no jurisdiction to pass any but a money decree, leaving the Court of the district in which the property is situated to execute it against the property mortgaged—*Mahomed Phuleel* vs. *Mussamut Sona Kooer*, 23 W. R., 123. See also *Buldeo Dass* vs. *Mussamut Mool Kooer*, 2 Alla., 19.

Actually and voluntarily resides.—The Supreme Courts established at Calcutta, Madras, and Bombay, were empowered to try "all and all manner of actions and suits against all and singular the *inhabitants* of the said Calcutta, Bombay, and Madras." The word "inhabitant" for the purpose of "jurisdiction" meant "resident"—*Ram Narrain Tanker* vs. *Chederbule Nurseah*, 2 Str., 289; and did not include a person having daily employment in Calcutta, but residing outside it, and coming in in the morning and returning in the evening—*Goculchund Bannerjee* vs. *Camdeb Mookerjee*, Mor., 148; but otherwise, when in addition he often slept at his father's house in Calcutta—*Habberley* vs. *Bason*, 1 Mor., 160 and note (b); or where, though carrying on business all day in Calcutta and earning his livelihood, he slept in Entally at night to *avoid jurisdiction*—*Martindell* vs. *To Man*, Mor., 161; *Mussamut Bhando Beebee* vs. *Moonshee Hossein Ally*, Mor., 166.

No length of time is necessary to make a person an inhabitant—*Madoo Wissenath* vs. *Balloo Gunnasett*, Mor., 149; and a man who had come to Calcutta, with no definite object, but had slept there, and the plaint was filed when he was in Calcutta, was held subject to the Court's jurisdiction—*Punchanand Bose* vs. *Davison*, Mor., 149. But the residence must have been voluntary—*Madoo Wissenath* vs. *Balloo Gunnasett*, Mor., 149. A person confined in jail without just cause, as where he had been brought down from the Mofussil by process in a suit as to which he was discharged for want of proceeding, was not considered to be an inhabitant—*Dahan* vs. *Mendes*, Mor., 147. Otherwise, if he had been lawfully confined, as if he had been imprisoned on conviction for a misdemeanour—*Colepersaud Dutt* vs. *Prankissen Haldar*, Mor., 165. The Sudder Dewanny held, so far back as 1810, that a state prisoner was amenable to the jurisdiction of the Civil Court of the district in which he lived for a debt contracted in a foreign country—*Dwarka Dass* vs. *Raja Jhoolal*, 1 S. D. A. Sel., 410. The Madras Court went further and exempted from jurisdiction persons compelled by the injurious act of others, to seek justice at the Presidency, and persons visiting it on public business, provided they did not remain there for any other purpose—*Nagapah Chetty* vs. *Rachunmmal*, 1 Str., 152; *Boojung Row* vs. *Chittoo Row*, 1 Str., 210. The Bombay Court held that *residence at the time of the contract*, or at the commencement of the suit was sufficient—*Madoo Wissenath* vs. *Balloo Gunnasett*, Mor., 153. A bond reciting the obligor to be "of Calcutta" was *primâ facie* evidence that he was an inhabitant—*Dutt* vs. *Ramnarain*, Mor., 121.

Under their Charters the High Courts possess jurisdiction if the defendant at the time of suit dwells within the limits of their ordinary jurisdiction. A person, having a permanent residence outside Calcutta, who visits Calcutta for the purpose of carrying on a suit,

does not dwell in Calcutta. In *Emritlal* vs. *Kidd* (2 Hyde, 117), Levinge, J., said :—"I consider that the word 'dwell' has a more extended signification than the word 'reside,' and means a permanent as opposed to a mere temporary residence. A traveller, putting up at an hotel, may be said in one sense to reside there, but a man can only be said to dwell in the sense in which that term is used as giving jurisdiction in the place where he ordinarily and permanently resides. "So, where defendant, an officer in the Bombay Staff Corps, holding an appointment in Sind, visited Bombay on leave for ten days, during which a plaint was filed against him, and he was served with a writ, it was held that the temporary residence for a few days did not amount to dwelling within the meaning of the Charter"—*Kavasji Framji* vs. *Wallace*, 1 Bom., 113. The result of these decisions seems to be that, if a person has a permanent dwelling he does not "dwell" in the sense used in the charter at a place where he has lodged for a temporary purpose, but it is otherwise if he has no permanent dwelling. So where defendant had usually a house at Mussoorie from March to October, where he left his wife and children, while he attended race meetings in the plains and visited Calcutta, in March, merely temporarily and for the purposes of pleasure ; it was held he was liable to answer in a suit filed during his stay in Calcutta ; that he could not be said to dwell at Mussoorie as he never lived there during the winter months, and though he kept an establishment there for his children, yet at the time the suit was instituted he had no house of his own—*Monis* vs. *Baumgarten*, Bourke, 128 ; Coryton, 152. A party spending his time alternately in the Mofussil and Calcutta, and resident in the latter for some days previous to and on the day of filing the plant, is, for the purpose of jurisdiction, said to dwell in Calcutta—*S. M. Nishadiney Dossee* vs. *Kally Kisto Ghose*, Coryton, 24. The same meaning has been attached to the word "dwell" in other Acts. Thus where an officer attached to a regiment at Shahjehanpore, who had been gazetted to two years' furlough, was served with process whilst attending a race meeting at Meerut, it was held that if he had not availed himself of furlough, but was only present on leave at Meerut, he was not dwelling within the jurisdiction of the Meerut Small Cause Court ; *Semble*, if having availed himself of furlough, he retained his permanent residence at Shajehanpore and only visited Meerut for a few days. But, if having availed himself of furlough, and having retained no permanent place of residence at Shajehanpore or elsewhere, he attended the race meeting with the intention of leaving after the races, he was dwelling within jurisdiction—*Mayhew* vs. *Tulloch*, 4 Alla., 25. So, when a person resides at one place, his mere casual presence, or even residence for a temporary purpose within jurisdiction without the intention of remaining is not "dwelling" within the meaning of the Small Cause Court Act—*Saminatha Pillay* vs. *Varisai Mahomed Ravattan*, 2 Mad , 304 ; *Madho Doss* vs. *Sita Ram*, 3 Alla., 121. Where a servant, whose home was in Nuddea, resided with his master at Monghyr, and had no intention of returning home soon, it was held he dwelt at Monghyr and not at Nuddea—*Porgash Parray* vs. *Hachim Khansamah*, 7 W. R , 417 ; see also *Gendu* vs. *Govind*, 10 Bom., 409. Whether persons imprisoned can be said to dwell at their homes or not, depends on whether they have any intention of returning to their previous places of abode on the termination of their imprisonment—*Gopal Chunder Sircar* vs. *Kurnodyar Moochee*, 7 W. R., 349. Where the payee sued the maker of a note which was dated "Madras, 27th September 1860," and delivered to the plaintiff at Madras, it was held that this was *primâ facie* evidence of dwelling within the High Court's jurisdiction—*Winter* vs. *Round*, 1 Mad., 202, explained in *Rajendra Rau* vs. *Sama Rau*, 1 Mad., 436.

The decisions on the County Courts Act in England are to the same effect. Thus, a a man having his permanent residence at one place and a lodging at another for a temporary purpose only, was held not to dwell in the latter place—*Macdougall* vs. *Paterson*, 21 L. J. (C. P.), 27. A mere visitor acquires no dwelling—*Butler* vs. *Ablewhite*, 28 L. J. (C. P.), 292 ; see cases collected in *Adam* vs. *South-Western Railway Company*, 6 H. & N., 404. A person who has no permanent place of of abode "dwells" at the place at which he may be temporarily residing—*Alexander* vs. *Jones*, L. R., 1 Exch., 133.

In the present Act the word "dwell" has been replaced by "reside." What is meant by residing is a question of fact depending on the circumstances of each case. The words "dwell" and "reside" express the same idea—*Mahomed Shuffi* vs. *Laldin Abdulla*, I. L. R., 3 Bom., 227. By 11 and 12 Vict., c. 21, s. 5, jurisdiction in insolvency is conferred when the person "shall reside, within the jurisdiction" of any of the High Courts. A petitioner came down from Cawnpore where he had resided for some time and left his wife, to file his petition, which he did after living eight days in a hotel. It was held that the petitioner had come to file his petition and not to reside (though he had stated that he intended to remain in Calcutta after his discharge), and that the Court had not jurisdiction—*In the matter of Tietkins*, 1 Ben., 84 ; see also *Manning* vs. *Manning*, L. R., 2 P. & D., 223. And where a person whose family residence in Bhagulpore had been sold in execution of decree, left his family in that district, and coming to Calcutta lived in a hired house from May till September, when he left to obtain funds to carry on a petition of insolvency which he had filed in July, he was held not to reside within jurisdiction although he returned in November and lived as before—*In re Ram Paul Singh*, 8 C. L. R., 14. *In re Hurruck Chund Golecha*, I. L. R., 5 Cal., 605, an insolvent was held to "*reside*" in Calcutta who carried on business there by means of a gomashta.

A suit to wind up a partnership may be brought in the Court within whose jurisdiction the defendants reside, notwithstanding the provisions of the Contract Act, section 265.—*Javati Ramasami* vs. *Theruvengadasami*, I. L. R., 1 Mad., 340.

The Court of the Recorder of Rangoon has, under the Burmah Courts Act, no jurisdiction in a suit brought against a defendant dwelling in Surat, though the cause of action arose in Rangoon—*Anonymous*, 18 W. R., 397. See *ante*, section 3.

Carry on business.—In the case of *Chinammal* vs. *Tulukannatammal*, 3 Mad., 146, it was decided that a trader in the Mofussil, who habitually sent grain to Madras to be sold by a party who was a general agent for the sale of goods sent to him by different persons, did not carry on business within the jurisdiction of the High Court, although he himself had sometimes accompanied the loads. Scotland, C.J., said :—

"It could not have been intended (as observed in the judgment of the Court in *Subburaya Mudali and others* vs. *Government*, 1 M. H. C. Reps., 286) that the words 'carry on business' were to be understood in their most general sense. Giving proper effect to the other words of the provision, the section, I think, requires that the defendant should, at the time of the commencement of the suit, carry on, within the local limits of the Court's jurisdiction, some independent regular business in person, as in the case of *Mitchell* vs. *Hinder* (23 L. J., Q.B., 273), or at an office or other fixed place of business (see *Rolfe* vs. *Learmonth*, 14 Q. B., 96), either personally *or by clerks or servants employed by the defendant and conducting the business under his control and in his individual or partnership name*. Here the defendant had no place of business in Madras, and the sales were effected by Narayana in his independent trade or business of a general broker for a commission received from the purchasers. In *Corbet* vs. *The General Steam Navigation Company* (4 Hurl. and Nor., 482 ; 28 L. J., Ex., 215), and in *Minor* vs. *The London and N. W. R. Company* (1 C. B. N.S., 325) it was held that the defendants in those cases did not carry on business within the meaning of the County Courts Act at a place where they employed *general* agents to act on their behalf ; and in the present case I think Narayana is the only person who can be said to have carried on business within the meaning of the section in question with respect to the paddy sent to him for sale. For these reasons I am of opinion that the Court has no jurisdiction to entertain the suit. It should be understood that I do not mean by any expression in this judgment to question in the slightest degree the decision in *Shiel* vs. *The Great Southern Railway Company* (referred to as an authority by the Court in *Subbaraya Mudali and others* vs. *Government*, and in the late case *re Brown* vs. *The London and N. W. Railway Company*, 32 L. J., Q. B., 318) as to the meaning of the words "carry on business" in their application to Railway Companies and other corporate bodies having numerous stations and offices throughout the country." So it has been held that the test of carrying on business as a retail dealer is "sale," and that a retail dealer in European goods, residing and carrying on business at an up-country station, is not within the jurisdiction of the High Court of Bombay, merely from the fact that he has an agent in Bombay for the purpose of purchasing and forwarding goods to be used in his trade—*Framji Kavasji Masker* vs. *Hormasji Kavasji Masker*, 1 Bom., 220 ; and that an English firm does not carry on business within local limits by employing a firm as commission agents in Bombay—*Khimji Chaturbhuj* vs. *Sir Charles Forbes, Bart.*, 8 Bom., 102. So also, that a person, who carries on business at a place by a commission agent to whom he only consigns goods, does not carry on business within the local limits of a Court where the commission agent resides—*Goopee Mohun Roy* vs. *Protab Chunder Roy*, 11 W. R., 530 ; and generally, that it could not be intended that a person residing at a distant place, and there carrying on his business in person, might, because of his carrying on business within local limits by a gomashta, clerk, or agent, or because of occasional visits only, be sued in the High Court at the discretion of the plaintiff, without any regard to the place where the cause of action arose—*Subbaraya Mudali* vs. *Government*, 1 Mad., 286. It will be seen, however, on comparing this case with that of *Chintammual* cited above that Scotland, C.J., has somewhat modified his opinion. In addition to actual inhabitancy the Supreme Court had jurisdiction by constructive inhabitancy on the ground of trading. The decisions on this point will be found in Morton's Reports, Morley's Digest, and 3 Moore's Indian Appeals. Carrying on business by factors was not sufficient to ground that jurisdiction—*Doss* vs. *Haniakram*, Fulton, 334.

A person who has no regular office, but comes once or twice a week from the Mofussil to a friend's house in Calcutta and sees people there on business, and contracts with B in Calcutta for the hire of cargo boats, carries on business in Calcutta—*Grish Chunder Bannerjie* vs. *Collins*, 2 Hyde, 79 ; and so does the Captain of a foreign ship trading to this port—*Queen* vs. *Judge of Small Cause Court*, 2 Taylor and Bell, 7 ; see section 76, post.

Zemindari business is not business of the kind contemplated in this section—*Anonymous*, 23 W. R., 223 ; *Nobin Chunder* vs. *Buroda Kant Shaha*, 19 W. R., 341.

Personally works for gain.—These words were inserted to give the Courts jurisdiction over persons who, though dwelling out of the local limits, personally worked for gain within them. A person residing at Ghoosery outside Calcutta, who habitually and constantly comes to Calcutta for the purpose of making contracts, and therefore for the purpose of carrying on his business as a contractor, carries on business and works for gain within the local limits—*Greesh Chunder Bannerjee* vs. *Collins*, 2 Hyde, 79 ; an Advocate of the High Court, residing out of the local limits, but who holds himself out as ready to practice in the High Court, and who goes there whenever he is engaged to appear personally, works for gain within the local limits—*Rai Narain Dass* vs. *L. Newton*, 6 Alla., 43.

Government cannot be said to carry on business or work for gain within the meaning of this section, and can only be sued where the cause of action arises—*Cubit Sparkhall Rundle* vs. *Secretary of State in Council*, 1 Hyde, 37 ; *Subbaraya Mudali* vs. *Government*, 1 Mad., 286.

Relief by Personal Obedience.—Under the Charter, suits for foreclosure or for redemption of land in the Mofussil are excluded as being suits for land (see cases above mentioned); and only a limited relief can be given against the individual. A suit to declare that a person resident in Calcutta holds certain lands in the Mofussil, subject to certain trusts, is not a suit for land, and may be tried in Calcutta—*Bagram* vs. *Moses*, 1 Hyde, 284; nor is a suit to enforce the right of parties to act as co-sebaits to an idol endowed with lands in the Mofussil where possession of any lands is not claimed—*Juggodumba Dossee* vs. *Puddomoney Dossee*, 15 B. L. R., 318; nor is a suit for specific performance of a contract to sell lands outside Calcutta—*Ramdhone Shaw* vs. *Sreemutty Nobamoney Dassee*, Bourke, 218; but see *Sreenath Roy* vs. *Cally Doss Ghose*, I. L. R., 5 Cal., 82; nor is a suit by one shareholder to recover his share of the rents received by another, although the title to the land is in dispute—*Chintaman Narayan* vs. *Madhavrav Venkatesh*, 6 Bom., 29.

The Sudder Dewanny Adawlut declined to take cognizance of a suit for the title deeds of property in Calcutta, by a person claiming as a Hindu widow—*Maha Ranee Bussunt Koomaree* vs. *Maha Ranee Kummul Kumaree*, 7 S. D. A., Sel., 168; but see *Juggunauth Doss* vs. *Brijnauth Doss*, I. L. R., 4 Cal., 322; 3 C. L. R., 375.

This section determines the powers of the Courts, to act *in personam*, when the person against whom the relief is sought resides within jurisdiction. The jurisdiction is limited to cases in which the relief sought can be entirely obtained through personal obedience, and does not go to the full extent claimed by the English Courts of Equity to take cognizance of any equity between persons residing within jurisdiction respecting lands outside it. Thus, it is doubtful whether our Courts will be able to entertain suits for foreclosure or sale of property beyond their local jurisdiction. See Westlake's Private Internat. Law, p. 58; Burge's Col. Law, 398, 399; 4 Phillimore's Internat. Law, 584; *Paget* vs. *Ede*, L. R., 18 Eq., 118; *Longdendale Cotton Spinning Co.* in re, 8 Ch. D. 150; and the cases under immoveable property collected above.

NOTE.—It will be seen that neither explanation 1 nor 2 of the next section has been expressly extended to the proviso to this section, and that the words "at the time of the commencement of the suit," with reference to residence, &c., to be found in that section and in section 12 of the Charter, do not exist in this proviso. See *Harjiban Dass* vs. *Bhagwan Dass*, 7 B. L. R., 102, 535; *Chinnamal* vs. *Tulukannat Ammal*, 3 Mad., 146; *Anantha Narayona* vs. *Periyana Rone*, 5 Mad., 101, as to residence at commencement of suit. It may, however, be said that the latter was not necessary, inasmuch as the relief sought being against the person, it would be impossible to obtain it unless the defendant resided within the local jurisdiction at the time of instituting the suit, and that the former was deliberately excluded, as the suits were not stated to be suits in which the cause of action arose within local limits.

Suits to be instituted where defendants reside or cause of action arose.

17. Subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction—

(*a*) the cause of action arises; or

(*b*) all the defendants, at the time of the commencement of the suit, actually and voluntarily reside, or carry on business, or personally work for gain; or

When the defendant is not within jurisdiction plaintiff must shew that at the time of the commencement of the suit the defendant actually and voluntarily resided or carried on business, or personally worked for gain within the jurisdiction—*Modhu Soodun Chowdhry* vs. *Cochrane*, 6 C.L.R., 417.

(*c*) any of the defendants, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain: provided that either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution.

Resides.—This explanation indicates that the word "resides" is to be construed more widely here than in section 37, cl. (a) post,—*Ram Chundra Sakharam* vs. *Resato Durgaji*, I.L.R., 6 Bom., 100. As to the nature of the residence that will give a Court jurisdiction, see *Orde* vs. *Skinner*, 7 C.L.R., 295.

Explanation I.—Where a person has a permanent dwelling at one place and also a lodging at another place for a

temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation II.—A Corporation or Company shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations.

(a.) A is a tradesman in Calcutta. B carries on business in Dehli. B, by his agent in Calcutta, buys goods of A, and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Dehli, where B carries on business.

(b.) A resides at Simla, B at Calcutta, and C at Dehli. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Dehli, where C resides; but in each of those cases, if the non-resident defendant objects, the suit cannot be maintained without the leave of the Court.

This section applies to M. S. C. C.

Illustration (*a*) is taken from *Winter* vs. *Way*, 1 Mad., 200; and illustration (*b*) from *DeSouza* vs. *Coles*, 3 Mad., at p. 397.

Cause of Action.—A cause of action was defined in the Bill to mean "the whole of the circumstances which the plaintiff must allege in order to shew a right to sue." This definition followed the judgment of Bittleston, J., in *DeSouza* vs. *Coles*, 3 Mad., 384, who held with reference to the Letters Patent (in which the cause of action is spoken of as arising "in whole or in part" within the jurisdiction), that the following propositions might be deduced from the English decisions. *First.*—That the "cause of action" meant the whole cause of action, and as the charter expressly referred to a cause of action arising wholly or in part within the local limits, it was safe to say that the cause of action spoken of might consist of several parts, and the parts might arise in different places; *Secondly.*—That the whole cause of action includes every fact essential to the maintenance of an action, and that each fact separately was but a part of the cause of action. And, notwithstanding the objections of Holloway, J., this seems to have been the prevalent opinion in India—*Harjiban Doss* vs. *Bhugwan Dass*, 7 B. L. R., 102, 535; *Mothoor Mohun Roy* vs. *Jadoomoney Dassee*, 10 B.L.R., 122; *Kartic Churn Setty* vs. *Gopalkisto Paulit*, I. L. R., 3 Cal., 264; but this view was dissented from in a late case in Madras, where Kindersley, J., referring to *Vaughan* vs. *Weldon*, L. R., 10 C. P., 47, and following *Gopikrishna Gossami* vs. *Nilkomul Bannerji*, 13 B. L. R., 461, held that in a suit for damages for breach of contract the whole cause of action arose in Madras where the breach was committed—*Muhammad Abdul Kadar* vs. *East Indian Railway Company*, I. L. R., 1 Mad., 375; and see also *Lalyee Lall* vs. *Herdey Narain*, Reg. Ap. 263 of 1880, 11 C. L. R., 125, per *Cunningham* and *Tottenham* J.J.

Although it has been said that to give the Courts jurisdiction, all things which go to constitute the cause of action must occur within jurisdiction, yet this must be taken subject to the explanation that there is a clear distinction between suing a man as a *representative* upon a cause of action arising out of his own acts, and upon a cause of action arising out of the acts of the person for whom he is substituted. In the latter case the representative may be sued in the Court within whose jurisdiction the cause of action with the deceased person arose—*Caleb Ladd* vs. *Parbutty Dassee*, 2 Hyde, 18.

The mere fact of drawing and delivering a Bill of Exchange within a foreign state does not give the Courts of that state authority to entertain a suit on the bill—*Malthappi Chetti* vs. *Chellappa Chetti*, I. L. R., 1 Mad., 196. It should be brought where non-payment took place—*Jumoonah Pershad* vs. *Zabunnessa*, 5 C. L. R., 268.

In an action to recover *money paid in Calcutta* on hoondees drawn by defendant beyond the local limits, but sent by him to Calcutta and there accepted and paid by the plaintiff, it was held that the whole cause of action arose within Calcutta—*Joan Mull* vs. *Munnoo Lall*, 1 Ind., J. (N. S.), 209. So where a resident in the Upper Provinces sent cotton to A in Calcutta for sale, and drew hoondees against it payable in Calcutta, and the hoondees were first negotiated and there accepted and paid by A's gomashta in Calcutta; in a suit by A not on the hoondees but for *a balance of account*, it was held that as the bills were made payable in Calcutta and presented there, the liability arose from the implied contract to repay the money and the whole cause of action arose in Calcutta—*Dhanraj* vs. *Gobindaram*, 1 B. L. R., 76.

So where a vakil received money for his clients, and gave it to their agent for delivery to them and the agent did not deliver it, and the vakil was compelled by the Civil Court to pay it over again, it was held that the cause of action arose when the plaintiff was compelled to pay the money—*Penuballi* vs. *Bimraja Ramaya*, 2 Mad., 21.

The High Court has jurisdiction in a suit on a promissory note if the note is payable to a payee who resides in Calcutta, and is made and delivered to him there—*Ramgopal Law* vs. *Richard Blacquiere*, 1 B. L. R., 35 ; or is made payable within jurisdiction, and has been delivered within it—*Isser Chunder Sein* vs. *L. Cruz and another*, 1 I. J. (N. S.), 233 ; and *primâ facie* there is jurisdiction if the note, though really made beyond jurisdiction, has been signed *as made* within jurisdiction and delivered within it—*Winter* vs. *Round*, 1 Mad., 202 ; but it is otherwise where a bond has been executed beyond the local limits, and the stipulation in the document has been general, and no particular place has been named —*Rajendra Rau* vs. *Sama Rau*, 1 Mad., 436, (following *Rex* vs. *Danser*, 6 T. R., 242.) In this case the Judge decided, following *Wilde* vs. *Sheridan*, 21 L. J. Q. B., 260, that if the contract had not been made in *Madras*, the High Court would not have jurisdiction.

Where plaintiff sued on a promissory note executed beyond, but payable in Calcutta, leave to sue not having been obtained before the institution of the suit, it was held that the High Court had no jurisdiction—*Mothoor Mohun Roy* vs. *Jadoomoney Dassee*, 10 B.L.R., 122 ; *Harjiban Dass* vs. *Bhugwan Dass*, 7 B. L. R., 102, 535. And where a deed of mortgage of land wholly situated out of Calcutta was executed (and also the money advanced) in Calcutta, a suit on the Original Side of the High Court for money lent, brought on the Covenant to pay—no leave to sue having been obtained—was dismissed for want of jurisdiction—*Kanyeloll Dutt* vs. *Prince Sahab Allum*, (March 1, 1880, *per* Wilson, J.) On the other hand it was held, in a case where leave to sue had been obtained, that a suit to recover, from a person residing and carrying on business outside of Calcutta, goods pledged with him which had been obtained from the plaintiff by means of an offence or fraud, could be entertained by the High Court of Calcutta, the offence or fraud alone having occurred within the jurisdiction—*Kartick Churn Setty* vs. *Gopalkisto Paulit*, I.L.R., 3 Cal., 264. A suit to set aside a consent decree of the High Court on the ground of fraud, may be brought without previous leave to sue having been obtained, though all the defendants dwell without the jurisdiction—*Bibee Soloman* vs. *Abdool Aziz*, 4 C. L. R., 366.

In a suit for goods sold and delivered, where the defendant does not dwell within the local limits of the High Court, the cause of action, *i. e.*, the sale and delivery of the goods must have taken place within those limits. Thus, where A sued B for goods sold in Madras and sent partly by sea and partly through the Post Office at A's risk to B, who lived outside the local jurisdiction, it was held that so long as the goods were at the risk of the consignor there could be no delivery to the consignee, and that the cause of action did not arise within the local limits—*Winter* vs. *Way*, 1 Mad., 200 ; otherwise if they had been sent at the risk of the defendant—*DeSouza* vs. *Coles*, 3 Mad., 405-6. Plaintiffs living at Madras entered into a contract with defendant, residing at Bimlipatam, the terms of which were that defendant should be entitled to half a share in any of the shipments made by him at Bimlipatam on his electing to take the risk. Defendant elected at Bimlipatam. In a suit brought for the losses sustained it was held that the High Court had no jurisdiction—*DeSouza* vs. *Coles*, 3 Mad., 384. So when an agreement in writing was signed by the plaintiff and defendant at Secunderabad in the Nizam's territories for a partnership in a tannery to be carried on at Bakaram, near Hyderabad, and by the terms of the agreement, the hides were sent to the plaintiff at Madras for sale and shipment to England, and hoondees in respect of the goods sent were drawn upon the plaintiff in Madras and paid by him, and an account of the partnership transactions was sent to him once in every eight days, it was held that the cause of action did not arise within local limits. Bittleston, J., said :—As regards a suit of this nature, where it appears that the partnership business is carried on substantially in two or more places, I think that the cause of action does partly arise in each of those places within the meaning of section 12 of our charter. The weight of authority also appears to me to be in favour of so holding, and the case of *Luchmee Chund* vs. *Zorawur Mull*, 8 Moore, 291, is, I think, distinguishable ; for that case was decided on the ground that the whole business of the partnership was substantially carried on at one place, *viz.*, Muttra, which was within the jurisdiction of the Court in which the suit was brought. From the statement of that case it appears that the partnership books were kept at Muttra, the capital was supplied by the plaintiffs at Muttra, and was employed by their agent there in the purchase of opium for the co-partnership ; that the opium was sent to Bombay and China for sale ; and the account sales and proceeds were remitted to Muttra where also the accounts were closed, and the balance sued for was struck"—*Bazah Meah Saib* vs. *Khajee Meah Saib*, 4 Mad., 218.

Plaintiff, a resident in Calcutta, sued H, a resident in Bombay, but carrying on business by his gomashta in Calcutta, and others resident in Bombay, to set aside a release executed in Calcutta of his interest in certain property situated in Bombay, on the allegation that it had been obtained from him on representations made by H ; held that the cause of action included the effect of the release on the property in Bombay and did not wholly arise in Calcutta—*Hadjee Ismail* vs. *Hadjee Mahomed Hadjee Jusub*, 13 B.L.R., 91.

Plaintiff sued in the Court of the Recorder of Rangoon on a judgment of the Court of Queens's Bench ; held the cause of action had not arisen within the local limits—*Sieveking Droop* vs. *Focke*, 9 W. R., 215.

A contract for the sale of land was made in *Dacca*. A promissory note for the purchase money was made and given in Calcutta. The note was not paid. A suit, the plaint in which set forth these circumstances, was held to lie in Dacca—*Proby* vs. *Bell*, 20 W. R., 6.

A contract was entered into at Rutlam in foreign territory between the firm of L, who resided and carried on business in *Agra*, and the firm of Z carrying on business at *Rutlam*

and elsewhere, for the establishment of a co-partnership for the purchase and sale of opium. The co-partnership business was carried on principally in Agra, and the business was conducted there, by means of the capital advanced to the concern by the firm of L, and there the partnership books were kept. At the close of the partnership which was attended with loss, a balance was struck in Agra which shewed a debt due by the firm of Z to the firm of L. In an action brought by the firm of L against the firm of Z in the Zillah Court of Agra for recovery of the balance, it was pleaded by Z that as the contract was made at *Rutlam* where the firm resided, the Agra Court had no jurisdiction: it was held that the cause of action arose in Agra and was within the Court's jurisdiction, inasmuch as (1) the established place of business of the partnership was in Agra, and there the books were kept; and (2) it was there that the *balance* was struck and payment of the balance due—*Luckmee Chund* vs. *Zorawur Mull*, 8 Moore, 291.

It has been held that the words "cause of action" in section 5, Act VIII, 1859, do not mean the whole cause of action, and that where a defendant refused to pay the price of indigo, and payment should have been made at the plaintiff's residence, the "cause of action" had arisen within the civil jurisdiction of the district in which the plaintiff resided, as there was an expectation of the fulfilment of the contract in it—*Hills* vs. *Clerk*, 23 W. R., 63. So where a bond was executed in Saharanpore, but the consideration for the bond arose in Dehra, and it was there the defendant agreed to give the bond, it was held that the bare fact that the bond was made at Shaharunpore was not sufficient to create a cause of action there, but as non-payment of the amount was the circumstance which immediately conferred the right to sue, the cause of action arose in Dehra—*Prem Shook* vs. *Bheekoo*, 3 Agra, 242. So where defendant at Parola agreed to sell and deliver to plaintiff at Padsha certain goods for which he paid in advance, and it was agreed that in default of delivery the value of the goods should be paid for at the market rate at Parola, it was held that the cause of action for non-delivering arose at Padsha and not at Parola—*Chunnilal Maniklal Bhai* vs. *Mahipatrav*, 5 Bom., 33. And where the suit was to compel B to join in registering a deed at X, and the defendant permanently resided at Y; *held*, that the suit might be brought at X or Y—*Sami Ayangar* vs. *Gopal Ayangar*, 7 Mad., 176. B entered into a verbal agreement with A at Serampore where A resided, to start in Calcutta a certain banianship business in conjunction with A's son, A agreeing to advance the required funds on the condition that the sum advanced should be repaid with interest within a certain date. No place was fixed for repayment. The money was advanced partly at Serampore and partly in Calcutta. B afterwards went to reside at Chandernagore. In a suit by A for the recovery of the balance of the sum advanced brought in the Hooghly Court, the Judge held that he had no jurisdiction, inasmuch as the cause of action arose in Calcutta; *held* that an action may be brought.

(1) Either in the *forum* of the place where the contract was made, in all cases except possibly where the contracting parties were at the time in a district in which neither of them had a dwelling or place of business, and that the Hooghly Court had jurisdiction (see contra, *Prem Shook* vs. *Bheekoo*, 3 Agra, 242); or

(2) where the contract was to be performed; and as the money was to be paid at Serampore, the Court had jurisdiction (see also *Hills* vs. *Clerk*, 23 W. R., 63; *Luckmee Chund* vs. *Zorawur Mull*, 8 Moore, 291), and that

(3) where no place for the performance of a contract is prescribed by the agreement or exacted by the necessities of the cases, the place where it is intended by the parties such contract should be fulfilled ought to supply the *forum*—*Gopi Krishna Gossami* vs. *Nilkomul Bannerjee*, 13 B.L.R., 461; 22 W. R., 79; cited and followed in *Mahomed Abdul Kadar* vs. *East Indian Railway Company*, I.L.R., 1 Mad., 375; and *Hari Mohun Mullick* vs. *Goburdhun Dass*, 3 C. L. R., 459, in both of which cases it was held that the place where the breach of contract occurred was the proper place in which to sue for damages for such breach.

Suits for compensation for wrongs to person or moveables.

18. In suits for compensation for wrong done to person or moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the plaintiff may at his option sue in either of the said Courts.

Illustrations.

(*a*.) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(*b*.) A residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

(*c*.) A, travelling on the line of a Railway Company whose principal office is at Howrah, is upset and injured at Allahabad by negligence imputable to the Company. He may sue the Company either at Howrah or at Allahabad.

This section applies to H. C. and M. S. C. C.

Suits for immoveable property situate in single districts, but within jurisdictions of different Courts.

19. If the suit be to obtain relief respecting, or compensation for wrong to, immoveable property situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be instituted in the Court within whose jurisdiction any portion of the property is situate; provided that, in respect of the value of the subject-matter of the suit, the entire claim be cognizable by such Court.

Suits for immoveable property situate in different districts.

If the immoveable property be situate within the limits of different districts, the suit may be instituted in any Court, otherwise competent to try it, within whose jurisdiction any portion of the property is situate.

This section applies to M. S. C. C. See Act XII of 1879, section 99:—The first paragraph differs from section 11, Act VIII, 1859, by the omission of the words "but in such case the Court in which the suit is brought shall apply to the District Court for authority to proceed with the same." The second paragraph similarly differs from section 12 by the words "but in such case the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed with the same; if the suit is brought in any Court subordinate to a District Court the application shall be submitted through such District Court to which such Court is subordinate." Under this Code sanction is no longer necessary; but the opposite party may proceed under section 20. See as to the previous practice—*Gour Soonderee Debia* vs. *Shumboo Chunder Mojoomdar*, 12 W. R., 328; *Bolaki Lall* vs. *Thakoor Pertab Singh*, I. L. R., 5 Cal., 928; 6 C. L. R., 371.

Plaintiff claimed two estates, one in Rajshahye and the other in Nuddea, as belonging to her deceased husband, and alleged dispossession by the defendants. She got a decree in Rajshahye for the land situated in that district, and then sued for the land in Nuddea, alleging a different act of dispossession from that in the former suit: *Held*, that the object of both suits was to establish the plaintiff's husband's title and to obtain possession of the land as the husband's widow and representative; that the allegation of the separate acts of dispossession did not affect the case, as all the acts complained of were prior to the institution of the first suit; and that she should have proceeded under this section and her suit was barred under section 7, Act VIII, 1859—*Jumoona Dassee Chowdhranee* vs. *Bama Soonderee Dassee Chowdhranee*, 2 W. R., 148; but in a similar suit in Madras the High Court held that it was not *barred*, on the ground that this section was *permissive* and afforded a plaintiff the option of trying to proceed in one suit for the recovery of all the property claimed, but did not touch on the jurisdiction of each Court in respect of the portion of property situated within its jurisdiction—*Subba Rau* vs. *Rama Rau*, 3 Mad., 376. Suits for foreclosure of property partly in Calcutta and partly in the Mofussil—*Khetter Mohun Doss* vs. *S. M. Chunder Money Dabee*, Coryton, 125; for sale of lands in different districts by establishing the judgment-debtor's rights thereto—*Ashruf Hossein Khan* vs. *Doctor Lazarus*, S. D., N. W., 1861, p. 588, fall within this section.

Power to stay proceedings where all defendants do not reside within jurisdiction.

20. If a suit which may be instituted in more than one Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly;

and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to

be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them.

In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings.

Application when to be made.

Every such application shall be made at the earliest possible opportunity, and in all cases before the issues are settled; and any defendant not so applying shall be deemed to have acquiesced in the institution of the suit.

This section applies to H. C. and, except the last paragraph, to M. S. C. C.

Notice must be given to the "other parties," so that if one defendant only applies he is bound to serve the other defendant with notice, and where an application is made by one of several defendants without notice having been given to the defendant who do not apply, the application should be allowed to stand over till notice is given. The denial of an application made by one defendant prejudices the right of another defendant, *subsequently* served with summons, to make a similar application (see section 126, N. Y. Procedure Code.)

Where two suits are pending in different Courts regarding the same subject-matter, priority of time is the proper guide in determining which suit should be allowed to proceed—*Mekjee Khetsee* vs. *Deveechund*, 4 C. L. R., 282. There A, who was employed as B's agent, instituted a suit in Calicut against B for the balance of an account, in July 1878. In December 1878, B sued A in Calcutta for an account and for damages caused by his alleged negligence, and it was held that the latter suit must be stayed.

An appeal lies from an order under this section, staying proceedings in a suit.

Remission of court-fee where suit instituted in another Court.

21. Where the Court, under section 20, stays proceedings, and the plaintiff re-institutes his suit in another Court, the plaint shall not be chargeable with any court-fee; provided that the proper fee has been levied on the institution of the suit in the former Court, and that the plaint has been returned by such Court.

This section applies to H. C. and M. S. C. C.

Procedure where Courts in which suit may be instituted are subordinate to the same appellate Court.

22. Where suit may be instituted in more Courts than one, and such Courts are subordinate to the same appellate Court, any defendant, after giving notice in writing to the other parties of his intention to apply to such Court to transfer the suit to another Court, may apply accordingly; and the appellate Court, after hearing the other parties, if they desire to be heard, shall determine in which of the Courts having jurisdiction the suit shall proceed.

This section applies to H. C.

Procedure where they are not so subordinate.

23. Where such Courts are subordinate to different appellate Courts, but are subordinate to the same High Court, any defendant, after giving notice in writing to the other parties of his intention to apply to the High Court to transfer the suit to another

Court having jurisdiction, may apply accordingly. If the suit is brought in any Court subordinate to a District Court, the application, together with the objections, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate. The High Court may, after considering the objections, if any, of the other parties, determine in which of the Courts having jurisdiction the suit shall proceed.

This section applies to H. C.

Procedure where they are subordinate to different High Courts.

24. Where such Courts are subordinate to different High Courts, any defendant may, after giving notice in writing to the other parties of his intention to apply to the High Court within whose jurisdiction the Court in which the suit is brought is situate, apply accordingly.

If the suit is brought in any Court subordinate to a District Court, the application, together with the objections, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate,

and such High Court shall, after considering the objections, if any, of the other parties, determine in which of the several Courts having jurisdiction the suit shall proceed.

Act VIII, 1859, section 13. This section applies to H. C.
See the case of *Skinner* vs. *Orde*, I. L. R., 2 Alla., 241; L. R., 6 Ind. App. 126.

Transfer of suits.

25. The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion without giving such notice, withdraw any suit, whether pending in a Court of first instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter.

For the purposes of this section, the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Act VIII, 1859, section 6. This section applies to H. C., P. S. C. C., and M. S. C. C.

On what grounds a suit should be transferred.—Section 6, Act VIII of 1859, contained a clause to the effect that any suit instituted might be withdrawn by the District Court whenever it might see sufficient cause for so doing. Under this section it has been decided that the power given to a Zillah Judge for the withdrawal of suits from the Subordinate Courts should only be exercised upon cause shown, and ordinarily not without opportunity given to the parties to the suit to be heard upon the

question. The District Court cannot withdraw from the Subordinate Court suits which the Subordinate Court has received by order of remand from a Court to which the District Court is itself subordinate, unless the higher Court has, by its order of remand, so changed the original character of the suit remanded as to make it in effect a new suit—*Mahomed Zahoor Ali* vs. *Thakooranee Rutta Koonwur*, 2 Alla., 481; see, however, *Tarucknath Mookerjee* vs. *Gouree Churn Mookerjee*, 3 W. R., 147. The High Court will not transfer a case from a Court which has jurisdiction to try it, where no application has been made to the Judge of the latter Court, nor any notice given to the plaintiff—*Kristo Dass Koondoo* vs. *Issur Chunder Chowdry*, 11 W. R., 189; and where a suit has by inadvertence been filed in a Court not competent to try it, the High Court cannot empower the Court to decide it—*Peary Lall Mosoomdar* vs. *Komal Keshore Dossea*, I. L. R., 6 Cal., 30. The 13th section of the Letters Patent (1865) of the High Court at Fort William gives the Court power to order a suit to be transferred for trial, only where the transfer is agreed on by the parties, or for the purposes of justice, and in the absence of agreement it must be made out that there will be inconvenience amounting to this—that if the case be tried in the Court in which it was originally tried the trial will be unsatisfactory. The mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred—*Rajah Ojooderam Khan* vs. *Sreemutty Nobinmoney Dossee*, 1 Ind. Jur., N. S., 396; but where, on a motion to transfer, it appeared that the parties and witnesses resided in Calcutta, that it would be cheaper to try the suit there, and that the parties appearing on the motion consented, a transfer was ordered—*Payn* vs. *Administrator-General*, I. L. R., 5 Cal., 768. It is no objection to the trial of a case transferred under this section that the transfer order was founded on a misconception—*Ram Bux* vs. *Girdharee Lall*, 2 Agra, 178.

At what stage a suit may be transferred.—This section does not authorize the transfer of proceedings already commenced and entertained; and consequently a District Judge has no authority to call up an execution case from the file of the Subordinate Judge to his own Court—*Moulvie Abdool Hye* vs. *McRae*, 23 W. R., 1; *Lutchmeeput Dokur* vs. *Maharajah Jugutinder Bunwary Lall*, Marsh., 195; contra—*Gaya Pershad* vs. *Bhup Singh*, I. L. R., 1 Alla., 180; *Balaji Ranchoddas* vs. *Mohun Lall*, I. L. R., 5 Bom., 680, see *Hira Lal* vs. *Badri Dass*, I. L. R., 2 Alla., at p. 796; nor transfer it—*Shaikh Hamidooddeen* vs. *Bhadae Sahoo*, 18 W. R., 345; *Anund Mohan Talookdar* vs. *Srija Kant Lahoory*, 13 W. R., 222; see cases cited *in arguendo*, 4 C. L. R., 344-5; nor can a Judge call up a case to his own file after the evidence has been taken in the Subordinate Court—*Dumree Sahoo* vs. *Jugdharee*, 13 W. R., 398; *Ranee Asmed Koonwar* vs. *W. Taylor*, W. R. (1864), p. 14; *Syud Korshed Ali* vs. *W. Tayler*, W. R. (1864), p. 15; but the irregularity is cured by consent—*Yakoob Ali* vs. *Luchmun Dass*, 6 Alla., 80. A District Judge is not competent to transfer a case of execution of a decree which has been passed by his own Court to the file of the Subordinate Judge for disposal—*Chowdry Harmedoollah* vs. *Mutecoonissa Bebee*, 15 W. R., 574; *Kedarnath Mahata* vs. *Bungshee Dhur Roy*, 17 W. R., 45.

A senior assistant Judge is not competent to hear an appeal from an order made in the execution of a decree in a case in which he is not competent to hear an appeal from the decree itself—*Narbheram Kisandas* vs. *Navindram Kusheram*, 5 Bom., 46.

Every suit requires a separate application to transfer—*Kishoree Lall* vs. *Luchman Doss*, 2 Alla., 147.

CHAPTER III.

OF PARTIES AND THEIR APPEARANCES, APPLICATIONS AND ACTS.

Persons who may be joined as plaintiffs.

26. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he

or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court in disposing of the costs of the suit otherwise directs.

Judicature Acts, Order 16, Rule 1, altered. This section applies to H. C., M. S. C. C., and P. S. C. C.

Government, under the name of The Secretary of State for India in Council, can sue, and is liable to be sued, in the Courts of this country.

Charities.—The Advocate-General is entitled to carry on all suits in the High Court for the administration of charitable funds, and to appear and represent the Crown in them if brought by another party—*Attorney-General* vs. *Brodie*, 4 Moore, 190; *Wardens of Nossa Senora* vs. *Hartmann*, Perry's O. Cases, 333; *Advocate-General* vs. *Damothar*, id., 526. See *Panchcowrie Mull* vs. *Chundroolall*, I. L. R., 3 Cal., 563.

Foreign States—recognized by the Government of this country—can sue in their recognized names—*U. S.* vs. *Wagner*, L. R., 2 Ch., App., 582; *U. S.* vs. *McRae*, L. R., 3 Ch., App., 79. A suit for property belonging to a Rajah cannot be brought in the name of his Political Agent—*Girdhari Das* vs. *Powlet*, I. L. R., 2 Alla., 690.

Joint Family. - All the members of a joint family should sue together; those only who refuse should be made defendants—*Rajaram Tewari* vs. *Luchman Pershaud*, 12 W. R., 478.

Contract.—All persons who entered into the contract should be made plaintiffs, even though they form a joint mitakshara family—*Ramsebuk* vs. *Ram Lall Koondoo*, I. L. R., 6 Cal., 815; but if the contract is in the name of one, he can sue—*Bungsee Singh* vs. *Sudist Lall*, 10 C. L. R., 263; *Unni Namliar* vs. *Nilakandan*, I. L. R., 4 Mad., 141. As to a suit for foreclosure by one of several joint mortgagees, see *Luke* vs. *The South Kensington Hotel Co.*, 7 Ch. D., 789; 11 Ch. D., 121.

Where a document creates a joint obligation all the parties should sue—*Gopal Chunder Gooho* vs. *Juggodumba Dossea*, 10 W. R., 411; *Ramjoy Singh* vs. *Nagur Ghazee*, 5 W. R., Act X, 1 68.

A person can sue on a bond in the name of another party if he shows by oral evidence that the debt secured by the bond was money advanced by him or by the party in whose favor the bond was executed in his behalf—*Deva Rau* vs. *Venatesa Achariyar*, 1 Mad., 452; but the manager of an indigo concern cannot sue in his own name on a contract executed with a previous manager, and in which he has no personal interest—*Glascott* vs. *Gopal Shaikh*, 9 W. R., 254.

Rent.—In a suit in regard to an undivided fraction of rent, the other co-proprietors should be made parties—*Gopal* vs. *Macnaghtan*, I. L. R., 7 Cal., 751; *Sogender Chunder Ghose* vs. *Hurris Chunder*, 10 C. L. R., 331; *Obhoy Gobind Chowdhry* vs. *Chowdhry*, I. L. R., 8 Cal., 277.

Forfeiture.—In a suit on a condition to re-enter all the parties suing must join as plaintiffs—*Reasut Hossein* vs. *Chorwar Singh*, I. L. R., 7 Cal., 470; so also in a suit to avoid an under-tenure—*Dwarka Nath Pal* vs. *Grish Chunder*, I. L. R., 6 Cal., 872.

Manager.—A Karayama Samudayam cannot sue in his own name in suits on behalf of the *Devaswam*—*Unni Namliar* vs. *Nilakandan*, I. L. R., 4 Mad., 141.

A Corporation must sue and be sued in its corporate name—*Ram Doss Sein* vs. *Stephenson*, 10 W. R., 366; it cannot be sued through its agent—*Nobin Chunder Paul* vs. *Stephenson*, 15 W. R., 534; so in a suit for declaration of title against a zemindar, the zemindar and not his *karindah* should be made a party—*Madho Rao Apa* vs. *Thakoor Pershaud*, 3 Agra, 127.

In case of an unincorporated or unregistered company, the individual members must sue and sued; but if a plaintiff does not know the names of the persons composing it he may sue them in the name in which they carry on business, stating in his plaint his inability to describe them better—*Koylash Chunder Roy* vs. *Ellis*, 8 W. R., 45.

Assignee.—In England the right to bring an action could not at common law be transferred or assigned, so that the assignee might bring a suit in his own name, in this country not only may a cause of action be so assigned, but also the liability

to be sued. A assigned his interest in an indigo factory to B, and in the deed there was a recital that B should take over the *dena-pawna* account of the factory as it, stood on the 30th of September 1856. C sued A and B jointly to recover rent in respect of lands occupied under lease for the use of the factory: *Held*, that by the law of this country the right of action to recover a debt is capable of being legally assigned so as to give the assignee a remedy by action at law, and there seemed no reason why the liability of the debtor should not also be assignable, and that the contract gave C a right to sue A and B jointly, and he was not bound to elect between them—*Kearnes* vs. *Bhawani Churn Mitter*, Ben., F. B. R., 54. See also as to the right of suit by a lessee, whose lessor was out of possession at the date of the lease—*Tiery* vs. *Krista Dhun Bose*, 1 Ind. L. R., App., 76; *Lokenath Ghose* vs. *Jugobundhoo Roy*, 1 I. L. R., Cal., 297.

Parties to Partition.—In all cases of joint ownership each party has a right to enforce partition—*Mitta Kunth Audhicarry* vs. *Neerunjun Audhicarry*, 14 B.L.R., 166; *Srimati Padumani Dasi* vs. *Srimati Jugadamba Dasi*, 6 B.L.R., 134; *Shama Soonderee Dabee* vs. *Jardine Skinner*, 14 B.L.R., 167, note; and all the shareholders in the joint property must be brought before the Court—*Pahaladh Singh* vs. *Luchmunbutty*, 12 W. R., 256. Partition may be enforced by a shikmee talook-holder—*Mothoor Chunder Kurmokar* vs. *Manick Chunder Bengo*, 6 W. R., 192; *Oomesh Chunder Saha* vs. *Manick Chunder Bonick*, 8 W. R., 128; a ryot—*Gouree Sunker Roy* vs. *Anund Mohun Moitro*, 9 W. R., 487; the purchaser of the share of a member of a joint undivided Hindu family in the joint dwelling-house—*Koonwar Bijay Kushub Roy* vs. *Shama Soonduree Dossee*, 2 W. R., Mis., 30; every number of a joint Hindu family—*Mussamut Deo Bunsee Kooer* vs. *Dwarkanath*, 10 W. R., 273, even though a minor, provided his interests would suffer if left in the hands of his co-parceners—*Kamakshi Ammal* vs. *Chindambara Reddi*, 3 Mad., 94; a grandson against his grandfather—*Nagalinga Mudali* vs. *Subiranya Mudali*, 1 Mad., 77; one of two co-heiresses, though the partition will not bind the reversioners—*Padamani Dassee* vs. *Jugadamba Dassee*, 6 B.L.R., 134. As to partition of part of an estate, see *Parbati Churn Deb* vs. *Ain-ud-deen*, 1. L. R., 7 Cal., 577.

In *Booth* vs. *Briscoe*, 2 Q. B. D., 496, the Court held that under the corresponding section of the Judicature Act, eight persons might join as plaintiffs in an action for libel: but that their damages, being several, should be severally assessed.

In a suit to set aside an alienation made by a sevait he must be made a party—*Rajendranath Dutt* vs. *Shaikh Mahomed Lal*, I. L. R., 8 Cal., 42.

Court may substitute or add plaintiff for or to plaintiff suing.

27. Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court, may, if satisfied that the suit has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as the Court thinks just.

Judicature Acts, Order 16, Rule 2. This section applies to H. C., M. S. C. C., and P. S. C. C.

A plaintiff can only be added under this section where there has been a *bonâ fide* mistake. Where certain persons having only an expectation, and not an interest, brought an action for administration, the persons directly insterested not being parties and apparently objecting; it was held this section did not apply—*Clowes* vs. *Hilliard*, 4 Ch. D., 413. The mistake may be of law as well as of fact. One shareholder sued on behalf of himself and others to set aside a contract not mentioned in the prospectus; on demurrer the Court added the Company as co-plaintiff—*Duckett* vs. *Gover*, Weekly Notes, 1877, p. 62. See also *Smith* vs. *Haseltine*, Weekly Notes, 1875, p. 250.

Where a person has been made a plaintiff under this section, a motion to strike out his name can only be made by himself—*Duckett* vs. *Gover*, Weekly Notes, 1877, p. 80; *Judooputtee Chutterjee* vs. *Chunder Kant Bhuttacharjee*, 9 W. R., 309. In an

action to set aside certain mortgages, an *ex-parte* application was made to strike out the plaintiff, a trustee, and substitute three infants, *cestuis que trust*, as plaintiffs and to make plaintiff a defendant: *Held*, that the three infants might be joined as plaintiffs, but the plaintiff could not be made a defendant and the parties altered on an *ex-parte* application—*Tildesley* vs. *Harper*, 3 Ch. D., 277.

Persons who may be joined as defendants.

28. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Judicature Acts, Order 16, Rule 3, altered. This section applies to H. C., M. S. C. C., and P.S.C.C.

The result of this section, when read with section 26, is to enable all persons who claim or against whom is claimed any right "jointly, severally or in the alternative" to be made plaintiffs or defendants respectively, and judgment to be given for one or more of the plaintiffs against one or more of the defendants according to their respective liabilities—*Bungshee Singh* vs. *Soodist Lall*, I. L. R., 7 Cal., 739, 745. When two or more plaintiffs sue jointly the defendant may set off against each individual separate ascertained sums—The *M. S.* and *L. Railway Company* and the *N. W. Railway Company* vs. *Brooks*, 2 Ex. D., 243. It is doubtful if the procedure hitherto in force in our Courts, of dismissing a suit in which several persons put forward a joint title and only one of them proved his title will now be followed—*Ram Camul Chuckerbutty* vs. *Nund Ram Coolal*, 10 W. R., 262. All difficulties may be avoided in the earlier stages by striking out the parties not entitled—*Sreeram Hasra* vs. *Gyaram Hatee*, 11 W. R., 507. In a suit instituted against six persons, plaintiff prayed for khas possession of one-fourth of a certain lot, or in the alternative for a decree for arrears of rent against the defendants or such of them as should on enquiry be deemed liable. Plaintiff had been kept out of possession by one defendant only, and if he were entitled to a decree for arrears of rent, another defendant was liable for a portion only. *Held*, the suit was properly framed—*Janokinath Mookerjee* vs. *Ramrunjun Chuckerbutty*, I. L. R., 4 Cal., 949.

A party may be added as a defendant, though the relief prayed against him be inconsistent with the alternative relief prayed against the other defendant —*Child* vs. *Stenning*, 5 Ch. D., 695; *Buddree Doss* vs. *Hoare, Miller & Co.*, I. L. R., 8 Cal., 170.

In an action brought by a company against A and B, the plaint stated that A through B, who professed to be, and in fact was, the agent of A, contracted to take a certain number of debentures in the plaintiff company, which contract A failed to perform: and that A denied that B was authorized by him to make the contract. The plaintiff prayed for specific performance of the contract or for damages against A; or in the alternative, if it should appear that B had no authority to act as A's agent, then for specific performance and damages against B. B having applied to have judgment entered up in his favour, or to have his name struck out as a defendant; *held*, that under the circumstances above stated, the plaintiffs were entitled to join A and B as defendants, and to claim alternative relief against them under this section—*Honduras Railway Co.* vs. *Tucker*, 2 Ex. D., 301.

By the rules under the Judicature Acts the procedure under the Bills of Exchange Act is continued, and it is doubtful if the rule corresponding to this section would apply to such cases. Thus, in *Campbell* vs. *Im Thurm*, Weekly Notes, 1875, p. 119, the Court refused, in an action by the indorsee against the acceptors, to add as a party the trustee appointed to distribute composition-money amongst the creditors of the acceptors. In this Code a special chapter has been devoted to Bills of Exchange, and probably this section will not apply to it.

In a suit for foreclosure every party having the right to redeem should get notice and be made defendants; such as the assignee of the mortgagor—*Mohun Lall Sookool* vs. *Goluck Chunder Dutt*, 10 Moore, 1; a puisne mortgagee of whole or of part, whether in possession or not—*Nuddyar Chand Chuckerbutty* vs. *Roop Dass Banerjee*, 22 W. R., 475; *Gunga Gobind Mondul* vs. *Banee Madhub Sheo Ghose*, 11 W. R., 548;

Lands were sold and purchase-money paid, and the vendor, unable to give possession or repay, gave bonds for the amount due; it was held that other part owners of the land were not liable on the bonds, nor could the vendor be taken to have executed the bonds as their agent as well as on his own account—*Ram Lall Bhagut* vs. *Kullabuttee Koonwaree*, Marsh., 9.

In a suit for land by one lessee against another, their lessors need not be parties—*Nagur Chand* vs. *Doorga Doss*, 11 W. R., 137; but if in addition plaintiff requires a declaration that the defendant's lessors hold under a forged lease, they should be made parties—*Dukhina Mohun Roy* vs. *Ameerooddeen Mahomed*, 12 W. R., 247.

In a suit for land where defendant's wife claims that her husband erected a house on it with her separate money, she should be made a party—*Gour Gopal Dutt* vs. *Bishonath Ghose*, Coryton, 41.

Joinder of parties liable on same contract.

29. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Judicature Acts, Order 16, Rule 5. This section applies to H. C., M. S. C. C., and P. S. C. C.

This section is very similar to section 120 of the N. Y. Proc. Code, which declares that persons severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff. It has been held under this section that, though the several parties to a bill or note may be sued in one action, it does not make them jointly liable or joint debtors; that an action may be brought against the maker and the executor of the indorser of a promissory note, although the maker is solvent, but separate judgments must be entered. And it has been held that, where a subsequent indorser sued prior indorsers to recover the amount he had been compelled to pay in a suit on the note, the action was for *money paid for the use of the defendants*, and not an action on the note, and, therefore, could not be maintained (Voorhie's 10th edition, 108); this, however, is not the law in India—*Mohendro Lall Bose* vs. *Jadhub Kissen Singh*, 14 W. R., O. J., 5.

The drawer and acceptor of a bill of exchange can be joined as to defendant in a suit brought by the holder—*Pestonjee Eduljee Gurdur* vs. *Mirza Mahomed Ally*, I. L. R., 3 Cal., 541.

One party may sue or defend on behalf of all in same interest.

30. Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable) by public advertisement, as the Court in each case may direct.

Judicature Acts, Order 16, Rule 9. This section applies to H. C., M. S. C. C., and P. S. C. C.

This section introduces a new procedure in our Mofussil Courts. The general rule is that all persons interested in the subject-matter of a suit in respect of its object should be made parties; but in cases in which there is a large class of individuals having the same interest, the Courts, for the sake of convenience, allow them to be represented by one of the classes for himself and the others—*Cockburn* vs. *Thomson*, 16 Vesey, 325.

Permission.—If the Court's permission has not been previously obtained the suit will be dismissed.—*Jan Ali* vs. *Atawur Ruhmun*, 9 C. L. R., 433.

Plaintiffs.—It is essential that the parties should be numerous; twenty have not been sufficient—*Harrison* vs. *Stewardson*, 2 Hare, 530. No formal statement to that effect has been necessary in the English Courts, and if the fact appears upon the face of the plaint, or by a schedule to a deed incorporated with it, that has been held sufficient—*Weld* vs. *Bonham*, 2 Sim. & S., 93. The plaintiffs or defendants must distinctly assert that they are competent to sue or be sued on behalf of all parties so concerned—*Baldwin* vs. *Lawrence*, 2 Sim. & S., 626; *Good* vs. *Blewitt*, 13 Vesey, 397. Where a crew were 80 in number, and 64 of them appointed 2 agents who sued for an account on behalf of the 64 only, and the remaining 16 were in no way brought before the Court, it was held impossible to take the account without bringing the 16 before the Court—*Leigh* vs. *Thomas*, 2 Vesey Sr., 312. In England the plaintiff cannot be compelled to give up the names and addresses of the persons on whose behalf he is suing—*Leathley* vs. *McAndrew and Company*, Weekly Notes, 1875, p. 259. He retains absolute dominion over the suit until decree, and may dismiss the bill at his pleasure: but after decree he cannot deprive the persons of the same class from the benefit of it (Daniell, 215; 2 Ex. D., 382), and a defence to him is a defence to the suit—*Leathley* vs. *McAndrew*, Weekly Notes, 1876, p. 38. If the suit is dismissed before decree, it is no bar to a suit by the others; but the decree binds both sides—*Sri Khanti Narayinappa* vs. *Indupa Ram Ramahugam*, 3 Mad., 226. The parties must have *the same interest*. Thus one creditor can sue on behalf of himself and all the other creditors of the deceased, for the object of each is to make out the estate of the deceased to be as large as possible—*Worraker* vs. *Pryer*, 2 Ch. D., 109; see also *Woolridge* vs. *Nones*, L. R., 6 Eq. 410; *Ruse River Co.* vs. *Atwell*, L. R., 7 Eq. 347; and so can one creditor under a trust deed for payment of debts (1 Daniell, 5th edition, 209); and a legatee on behalf of himself and all other legatees (*id.*); and an appointee under a will—*Manning* vs. *Thesiger*, 1 Sim. & S., 106; and some of the proprietors of a trading concern, on behalf of themselves and others for an account against their co-partners—*Chancy* vs. *May*, Prec. in Ch., 592; and a free-holder or copy-holder for a right of common—*Smith* vs. *Brownlow*, L. R., 9 Eq., 241; *Commissioner of Sewers* vs. *Glasse*, L. R., 7 Ch., 456; and a copy-holder for himself and other copy-holders—*Phillips* vs. *Hudson*, L. R., 2 Ch., App., 243; and one person on behalf of himself and others, to avoid paying a cess—*Attorney-General* vs. *Heeles*, 2 Sim. & S., 76; and an officer of a privateer for himself and crew against the owners for an account of capture according to the articles—*Good* vs. *Blewitt*, 13 Vesey, 397; and an officer of the East Indian army for himself and other officers and privates, for a distribution of prize-money in a certain way—*Brown* vs. *Harris*, 13 Vesey, 556; and a person for himself and others to protect property pending litigation and to prevent waste (1 Daniell, 5th edition, 215). And so also one member of a corporation can sue on behalf of himself and others to restrain the commission of an act which is *ultra vires*—*Bloxam* vs. *Met. Railway Co.*, L. R., 3 Ch., 337; *Clinch* vs. *Finan. Corporation*, L. R., 5 Eq., 450; L. R., 4 Ch., 117 (he may also sue in his own name)—*Hoole* vs. *Great Western Ry. Co.*, L. R., 3 Ch., 262; or if the directors and majority are using their power for the purpose of doing something fraudulent against the minority—*Atwool* vs. *Merryweather*, L. R., 5 Eq., 464, note; *Mason* vs. *Harris*, 11 Ch., D. 97; *Silber Light Co.* vs. *Silber*, 12 Ch., D., 717; and one director can sue the others in his own name on the ground of individual injury, if they wrongfully restrain him from acting as director—*Pulbrook* vs. *Richmond Consolg. Mg. Co.*, 9 Ch. D., 610. But as one object of incorporating bodies in England has been to avoid a multiplicity of suits, in all other cases the corporate body must sue—*Gray* vs. *Lewis*, L. R., 8 Ch., App., at 1051. An owner of a ship can sue on behalf of himself and others for freight and dues for the use of the ship—*De Hart* vs. *Stevenson*, 1 Q. B. D., 313; but if the parties have not the same interest in the suit, this procedure cannot be adopted. Where three persons filed a bill on behalf of themselves and others as subscribers to a Peruvian loan to rescind the contracts and have the subscription moneys returned, the bill was not allowed, as it did not necessarily follow that every subscriber desired to retire from the speculation—*Jones* vs. *Garcia Del. Rio*, 1 T. & R. 297; *Attorney-General* vs. *Heeles*, 2 Sim. & S., 76; see also *Weale* vs. *West Middlesex Waterworks*, 1 J. & W., 358; and so where a shareholder filed a bill on behalf of himself and others to restrain the directors from enforcing a call and to obtain a return of the deposit and allotment money on the ground of misrepresentation, it was held that it would not lie on that ground; for the case of each person deceived by the misrepresentation was peculiar to himself and must depend on its own circumstances—*Hallows* vs. *Ferme*, L. R., 3 Ch., App., 471; nor will a suit lie by a shareholder for himself and others, when the act complained of is only voidable and capable of confirmation by the members of the company, or a mere matter of internal regulation—*Russell* vs. *Wakefield Water Works*,

L. R., 20 Eq., 474; nor to dissolve a partnership—*Long* vs. *Yonge*, 2 Sim., 386. It will not be allowed in cases in which questions of priority or other matters are introduced which may give rise to opposition between the plaintiff and the others, such as a suit by an incumbrancer for himself and others where the claims are not precisely of the same degree—*Newton* vs. *Egmont*, 5 Sim., 137.

Defendant applied to have the names of others added as plaintiffs to secure his costs: *held*, that it was not shewn that the other names were necessary to completely adjudicate on the questions involved, and as to costs the Court might interfere and order security—*De Hart* vs. *Stevenson*, 1 Q. B. D., 313.

Defendants.—Like plaintiffs the defendants must be numerous, and it must be alleged in the plaint that the suit is brought against them personally and on behalf of the others—*Lanchester* vs. *Thompson*, 5 Mad., 13; the number of defendants named must be so large that it can be justly said they will fairly and honestly try the legal right between themselves and all other persons interested and the plaintiff—*Adair* vs. *New River Co.*, 11 Vesey, 444; and every right adverse to the plaintiff should be represented—*Mayor of York* vs. *Pilkington*, 1 Atk., 284; *Cramer* vs. *Bird*, L. R., 6 Eq., 143. Where fifteen hundred persons had a claim against a person for costs which all depended on the same question, namely, the validity of certain certificates, it was held that he could file a bill against some of them to restrain proceedings until the validity of the claims had been decided—*Sheffield Waterworks* vs. *Yeomans*, L. R., 2 Chan., App., 8. The cases in which representation has arisen in England are chiefly where a corporation has claimed a duty—*London* vs. *Perkins*, Toml. Bro. P. C., 602; or where a person claims a sole right to a fishery against a number of persons—*Mayor of York* vs. *Pilkington*, 1 Atk., 284; or where owners and occupiers sue to prevent the lord of the manor inclosing waste lands—*Commissioners of Sewers of City of London* vs. *Glasse*, L. R., 7 Chan., App., 456. This procedure has not been followed in the following cases, in which all the persons interested have been brought before the Court; namely, suits to foreclose or enforce a vendor's lien—*Attorney-General* vs. *Sittingbourne*, L. R., 1 Eq., 636; *Bishop of Winchester* vs. *Mid Hants Railway Co.*, L. R., 5 Eq., 17; *Khelut Chunder Ghose* vs. *Tara Churn Koondoo*, 1 W. R., 175; *Brojonath Kundu Chowdry* vs. *Khilat Chundra*, 16 W. R., 33; suits for partition—*Pahaladh Singh* vs. *Mussamut Luchmunbutty*, 12 W. R., 256; suits for contribution—*Shaikh Otioollah* vs. *Mussamut Ascerun*, 7 W. R., 194; *Nobin Mohun Ghosal* vs. *Gopal Chunder Mookerjee*, 11 W. R., 538.

Suit not to fail by reason of mis-joinder.

31. No suit shall be defeated by reason of the mis-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

Judicature Acts, Order 16, Rule 13. This section applies to H. C. and M. S. C. C.

Neither non-joinder nor mis-joinder has as a rule ever been considered a good ground for special appeal, unless it had been raised in the first Court; *Dhurm Dass Pandey* vs. *Mussamut Shama Soondri Debiah*, 3 Moore, 229; *Tarinee Churn Ghose* vs. *Hansman Jha*, 20 W. R., 240; *Tiluck Chunder Chuckerbutty* vs. *Muddun Mohun Joyce*, 12 W. R., 504, and there is proof of substantial injury or error affecting the merits of the case—*Durshun Pandey* vs. *Aminah Beebee*, 1 W. R., 114, or the jurisdiction has been affected—*Shunkur Patukh* vs. *Lalla Sheo Churn Lal*, 2 Alla., 443. Nor is it a ground even for regular appeal—*Ram Kanaye Chuckerbutty* vs. *Prosunno Coomar Sein*, 13 W. R., 176; *Ram Dyal Dutt* vs. *Ram Doolal Deb*, 11 W. R., 273; on the other hand, if raised in the first Court and improperly disallowed, but subsequently allowed in regular appeal, no special appeal will lie—*Mahomed Hosein* vs. *Potun*, 20 W. R., 147. Where the widow of a Mahomedan and his two daughters brought a joint suit for their respective shares which were awarded to them jointly, it was held that it was a mere error not affecting the case—*Sayad Miya Golam Nubee* vs. *Kharan Bibi*, 6 Bom., 177; and a suit for the rents of two tenures has been allowed, though dismissed in the Lower Courts—*Suroop Chunder Chowdhry* vs. *Nim Chand Chuckerbutty*, 13 W. R., 284. So a suit against four defendants to enhance three distinct tenures was allowed, but separate trials were ordered by the first Appellate Court—*Juggut Chunder Roy Chowdhry* vs. *Ear Mahomed Sircar*, 24 W. R.,

217. But the plea has been allowed where the first Court dismissed a suit brought for the price of timber against two persons who purchased separately, though at the same time—*Baroo Sircar* vs. *Massim Mundle*, 21 W. R., 206; and where, in a suit against the zemindars and purchasers to set aside the sale of five patni talooks, the first Court dismissed it for mis-joinder after taking all the evidence—*Imrit Nath Jha* vs. *Roy Dhunput Singh*, 18 W. R., 288; and where a suit against two purchasers was dismissed on the merits and, plaintiff appealing, an objection on the ground of mis-joinder was taken in cross-appeal—*Banee Krishun* vs. *Koondun Lal*, 2 Alla., 221. Where A sued B on a bond, and B and C for damages for fraud, and the suit was dismissed in the first Court, the objection of mis-joinder was allowed in regular appeal—*Bisheshur Pershad* vs. *Ram Churn*, 5 Alla., 25. And a rent suit against some forty tenants was held to have been properly dismissed in the first Appellate Court for mis-joinder, although the point had not been taken in the first Court—*Gunesh Pershad* vs. *Wilson*, W. R. (1864), 86; see also *Ram Chunder Paul* vs. *Omora Churn Deb*, 16 W. R., 155.

In actions of contract it is the right of the defendants if he takes the objection in proper time to have all the persons with whom he contracted joined as plaintiffs—*Ramsebuk* vs. *Ramloll Koondoo*, I. L. R., 6 Cal., 815.

Courts should reject plaints against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned—*Bisheswar Chakravarti* vs. *Shetal Chunder Chakravarti*, 8 W. R., 13; *Motee Lall* vs. *Ranee*, 8 W. R., 64; thus a suit for possession by two ryots whose holdings, though originally one, have for a long time been separated and held separately should have been rejected for mis-joinder—*Girwur* vs. *Hurphool*, 2 Alla., 306; where A sued for a determination of boundaries and joined the proprietors of three separate estates, it was held bad—*Baboo Motee Lall* vs. *Ranee*, 8 W. R., 64; so was a suit in which a Hindu sued to set aside independent alienations made by his father to several persons, and joined them all in the same suit—*Raja Ram Tewary* vs. *Luchmun Pershad*, 8 W. R., 15; *Raja Ram Tewary* vs. *Luchmun Pershad*, 12 W. R., 478; so a suit against five defendants, including separate claims of a most miscellaneous nature against each defendant, was dismissed in special appeal for being multifarious, the objection having been taken in the first Court—*Maniruddin Ahmed* vs. *Ram Chand*, 2 B. L. R., 341; and where A granted B five different mehals on different leases which were sold for arrears on two different dates and purchased by C and D, it was decided B could not sue all three to set the sales aside on the ground of irregularity—*Imrit Nath Jha* vs. *Roy Dhunput Sing*, 9 B. L. R., 241. Nor will a suit lie against several persons on a decision under section 318 of the old Code of Criminal Procedure, each defendant possessing a distinct portion—*Tara Prosunno Sircar* vs. *Koomaree Debee*, 23 W. R., 389; nor a suit against three vendors and their vendees for a right of pre-emption in three shares, sold to separate persons—*Shah Golam* vs. *Mussamut Wajeda Bibi*, 7 Alla., 188; and if through inadvertance such a plaint has been admitted, the other party has a right to object at the settlement of issues, or on motion to take the case off the file—*Ram Dyal Dutt* vs. *Ram Doolal Deb*, 11 W. R., 273; or by application under section 32, *infra*; but if the case goes beyond the first Court, the Appellate Court should, if possible, not dismiss, but try the claims against the different parties separately—*Juggut Chunder Roy* vs. *Ear Mahomed*, 24 W. R., 217; *Shoroop Chunder Paul*, vs. *Mothur Mohun Paul*, 4 W. R., 109; *Ram Nidhee Koondoo* vs. *Galuck Chunder Moshanto*, 11 W. R., 280. Where three Hindu widows sued two brothers-in-law and three purchasers from them who purchased at different times, to set aside the purchases, the suit was held bad—*Hurro Monee Dossea* vs. *Onookol Chunder Mookerjee*, 8 W. R., 461. The High Court in the North-West does not hold the same view on this subject, as the High Court in Calcutta. There, as in Calcutta, a suit against purchasers to set aside different purchases at different dates will be dismissed for mis-joinder—*Banee Krishun* vs. *Koondun Lall*, 2 Alla., 221; so also will a suit to set aside several alienations at different times, to different persons, by a Hindu guardian not a party—*Mata Pershad* vs. *Mussamut Bhagmanee*, 1 Alla., 128; but it will be otherwise if the guardian has been sued, for the causes of action can be joined against him and the other parties brought in to avoid a multiplicity of suits; so where the widow of a deceased Mahomedan alienated her husband's property, the Court seemed to hold that all might be sued in one action—*Jehan Bebee* vs. *Samik Ram*, 1 Agra, 109. This is also the opinion expressed by the Bombay Court in *Vithu* vs. *Narayan Dabhulkar*, 5 Bom., 30., where it was held that a person suing to set aside alienations made by a co-proprietor had only one cause of action against the latter, and should bring one suit against him and the alienees, or separate suits against the alienees and the co-proprietor; but that he could not sue the co-proprietor and each alienee jointly for each alienation. In Madras a joint suit against the alienor and all the alienees—*Sumi Chetti* vs. *Ammani Achy*, 7 Mad., 260, or against all the alienees of a deceased personwill lie—*Vasudeva Shanbhaga*

vs. *Kuleadi Narnapai* and 10 others, 7 Mad., 290; such a suit would not lie in Bengal; yet, when a Commissioner of Revenue had taken plaintiff's lands and let them out to certain persons, *held* that a suit would lie against them for possession—In the matter of *Rutnessur Dass*, 14 W. R., 381. A suit will lie by a mortgagee against the mortgagor, several puisne mortgagees and subsequent purchasers and against the representative of a judgment-debtor and certain alienees who were declared men of straw, to render property liable to a decree—*Wise* vs. *Gureeb Hossein Chowdhry*, 13 W. R., 271; or against the widows of a Mahomedan for a specified share in the deceased's property by inheritance, and to set aside two deeds of gift in lieu of dower —*Mussamut Ameerun* vs. *Mussamut Wussebun*, 12 W. R., 11; *Bal Kissen Mahapattar* vs. *Bistoo Charn*, 22 W. R., 532; and possibly against the subsequent alienees from her alone—*Krishna Gopal Ghose* vs. *Hurry Nath Dutt*, 25 W. R., 60; but a suit to redeem against the mortgagee and persons in possession *plus* a claim for damages against the mortgagee will not lie—*Keshoree Lall* vs. *Gobind Ram*, 4 Alla., 70. A suit to annul the settlement of several estates is not multifarious if based on one and the same title, though the settlement of the estates may have been concluded at different times—*Thakooraya* vs. *Bucktowar Singh*, S. D., N. W. 1853, p. 615.

The objection of mis-joinder does not apply to a case where several persons claiming under one general right sue together for the establishment of that right, although they are not all interested to an equal extent in the enjoyment of the right—*Ameer Beg* vs. *Jubbun Jan*, S. D., N. W., 1851, p. 95; and where the owners of four estates were dispossessed under one and the same survey award, they were allowed to sue jointly—*Anund Chunder Ghose* vs. *Komul Narain Ghose*, 2 W. R., 219. On the other hand, it has been held that, if the alleged wrongs be distinct and separable, committed by several persons, and not proceeding from any combination, the wrong-doers must be sued separately, irrespective of the plaintiff's title. Thus where plaintiff obtained a decree establishing his right to a number of villages, it was held that he could not bring one suit against all the persons in separate possession of distinct estates for *mesne* profits during wrongful possession—*Koondun Lal* vs. *Rae Himmat Singh*, 3 Alla., 86; see also *Hurro Monee Dassia* vs. *Onokool Chunder Mookerjee*, 8 W. R., 419.

A suit will lie against several persons for possession, on the ground that they have combined, forged a document and, making it the basis of their action, ousted plaintiff—*Gujadhur Pershaud Narain Singh* vs. *Saheb Roy*, 19 W. R., 203; and against several persons for a joint assault—*Ramessar Bhuttacharjee* vs. *Shib Narain Chuckerbutty*, 14 W. R., 419.

Court may dismiss or add parties

32. The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out;

and the Court may at any time either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

As to appeals from orders under this section, see *infra*, p. 65.

Consent of person added as plaintiff or next friend.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

See *Cormack* vs. *Grofrain*, Weekly Notes, 1876, p. 22. If the suit cannot go on without so doing—*Watson & Co.* vs. *Hurgobind Sookul*, 22 W. R., 35; *Beharee Lall*

Dass vs. *Radha Nath Dass*, 22 W. R., 229; *Ramsebuk* vs. *Ram Lall Koondoo*, I. L. R., 6 Cal., 815; or complete justice cannot be done in his absence—*Rajeddronath Dutt* vs. *Shaik Mahomed Lall*, L. R., 8 Ind. App. 135, the suit should be dismissed unless he should be made a defendant—*Beharee Lall Dass* vs. *Radha Nath Dass*, 22 W. R., 229; *Juggodumba Dassee* vs. *Haran Chunder Dutt*, 10 W. R., 109.

As to the form in which the consent should be given see *Application*, page 62.

Parties to suits instituted or defended under section 30.

Any person on whose behalf a suit is instituted or defended under section 30 may apply to the Court to be made a party to such suit.

Defendants added to be served.

All parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, 1877, section 22) the proceedings as against them shall be deemed to have begun only on the service of such summons.

It has been held that when a person is appointed co-plaintiff, proceedings as to limitation against him begin from the date of filing original plaint—*Kalee Kishore Chatterjee* vs. *Luckhee Debia Chowdhrain*, 6 W. R., 172. A plaintiff should not be added whose right is barred—*Kishen Lall Chowdhry* vs. *Chunder Coomar Roy*, W. R., 1864, p. 152; but in a later case it was held, that in a suit on a joint contract all the parties must be added whether the claim was barred against them or not, and as it was barred as against some of the joint plaintiffs the suit was dismissed—*Ramsebuk* vs. *Ram Lall Koondoo*, I. L. R., 6 Cal., 815. See, however, *Uma Sunduri Dasi* vs. *Ramji Haldar*, I. L. R., 7 Cal., 242.

S sued R and N jointly for money. The first Court decreed the suit against N and dismissed it in regard to R. N appealed but S did not. At the first hearing of the appeal R was made a respondent: the period allowed to S to appeal having expired. The Appellate Court dismissed the suit as against N and gave S a decree against R. *Held*, that the Court was not competent to give S a decree against R, the former not having appealed within the proper period—*Runjit Singh* vs. *Sheo Prosad Ram*, I. L. R., 2 Alla., 487.

The proviso as to limitation does not apply where the original plaintiff having the sole interest assigns to others after suit brought—*Suput Singh* vs. *Imrit Tewari*, 6 C. L. R., 62.

Conduct of suit.

The Court may give the conduct of the suit to such plaintiff as it deems proper.

Judicature Acts, Order XVI., Rule 13. This section applies to H. C., M. S. C. C., and P. S. C. C.; and the Revenue Courts.—*Shib Gopal* vs. *Beldeo Sahai*, I. L. R., 2 Alla., 264.

Under this Code the special procedure under the Bills of Exchange Act is continued, and it is not clear if this section applies to such procedure *Norris* vs. *Beazley*, 2 C. P. D., 80. This section applies to suits for moveables as well as immoveables—*Luleet Pandey* vs. *Byjnath Singh*, 14 W. R., 285. The general rule is that all persons having an interest in the object of the suit, and in whose absence the subject-matter of the suit cannot be fully investigated and disposed of, ought to be made parties, and that a person, who has no interest, against whom there can be no relief given, ought not to be a party—*Khajah Abdool Gunnee* vs. *Pogose*, 12 W. R., 436; *Fergusson* vs. *Government*, 9 W. R., 158; *Nga Tha Yah* vs. *Meekhan Mhone*, 13 W. R., 443; further, that persons should not be made co-plaintiffs unless their cause of action is the same as that of the other plaintiffs—*Government* vs. *Bourie Bhoomis*, 2 W. R., 280; thus a person claiming adversely to both plaintiff and defendant should not be made a party—*Joy Gobind Doss* vs. *Gowree Proshad Shaha*, 7 W. R., 202.

Application.—It may be *ex-parte* to add parties, Weekly Notes, 1876, p. 23; but not if it be to strike out or change the parties on the record—*Tildesley* vs. *Harper*, 3 Ch. D., 277. See, however, *Horwell* vs. *London Omnibus Co.*, 2 Ex. D., 365, 379, 382-3. This section does not contemplate any application to the Court by the person proposed to be added. The application must be made by a party already on the record—*Mohindro Bhoosun Biswas* vs. *Soshe Bhoosun Biswas*, I. L. R., 5 Cal., 882. In the case of a plaintiff express consent is necessary—*Omasundari Dasi* vs. *Ramji Halder*,

9 C. L. R., 13; but the section does not require that the consent of a person proposed to be added as plaintiff should be given in writing. It is sufficient if any solicitor consents on his behalf—*Cox* vs. *James*, 19 Ch. D., 55.

Struck out.—Under the old law a party could not be struck out, and another name substituted; but a name could be added—*Jodoo Potee Chatterjee* vs. *Chunder Kant*, 9 W. R., 309; and the person, if substituted, could not appeal or act like a party—*Saheb Roy* vs. *Choonee Singh*, 9 W. R., 487, unless the irregularity was cured by the consent of the opposite party—*Beer Chunder Roy* vs. *Shaikh Tummesuddin*, 12 W. R., 87; but now this can be done on application, and at or before the first hearing. A builder sued both the lessor and lessee for work and labour done. The lessor stated he had no interest in the action, and applied to have his name struck out. There was a dispute between the lessor and the lessee as to the liability: *held*, the question could not be decided summarily, and the lessor's name must stand, Weekly Notes, 1875, p. 203; but where a merchant sued his solicitors for negligence, and their defence was that the negligence, if any, was that of A B, whom they had instructed, the name of A B was inserted in the Lower Court, but struck out in appeal —*Lereculey* vs. *Harrison*, Weekly Notes, 1876, p. 39. A share of a village held in usufructuary mortgage was purchased at an auction-sale in execution against a shareholder, and sold by the auction-purchaser to plaintiff, who sued his vendor, mortgagor and mortgagee for possession on the ground that the mortgage had been paid off. It was held that the auction-purchaser's name should be struck out—*Syud Sukhawat Ali* vs. *Kisho Tewari*, 6 Alla., 208. A sued B; C intervened and was made a party. On appeal, the name of C was struck out and the suit remanded for trial; *held*, that all the evidence C had produced should be removed from the record—*Bucha Singh* vs. *Mirza Musuook Ali Beg*, 15 W. R., 572. A person who has an interest in a thing assigned to a trustee for the benefit of himself and others cannot sue the debtors of the estate; his remedy is to file a bill against the trustee to enforce execution of the trust—*Sharpe* vs. *San Paulo Ry.*, L. R., 8 Ch., App., 610. Where a creditor of a deceased person sued the Administrator-General, and other persons also claiming against the estate were made parties on the allegation that they had realized and were in possession of assets of the estate of the deceased, it was held that there was nothing to show that such persons were in the position of an executor or administrator *de son tort*, or partners of the deceased, or that the Administrator-General could not sue them, and that there being no other circumstances which would make it equitable that they should be jointly sued with the Administrator-General, they were wrongly made parties, and the suit ought to be dismissed—*Dhunraj* vs. *Broughton*, 15 B. L. R., 296.

Joinder.—Courts should not dismiss a suit merely on account of defect of parties, but should exercise the discretion vested in them by this section—*Ruchpaul* vs. *Johuree*, 2 Agra, 147; *Jonabali Mollah* vs. *Gollam Assad*, 21 W. R., 187.

A plaintiff applying under this section to join another as co-plaintiff must have a cause of action. A company transferred all its property, estates, and effects with appurtenances, "including a mortgage with the benefit of all securities" to a new company. At the date of transfer the old company claimed a right of action for breach of trust in respect of this mortgage. The new company sued; *held*, that the right of action did not pass to them; and as they had no right of action, they could not join the old company as co-plaintiffs—*New Westminster Brewery* vs. *Hannah*, Weekly Notes, 1876, p. 215; *Motee Chand Doss* vs. *Mooruleedhur Doss*, 15 W. R., 432; see also *Chunder Coomar Roy* vs. *Gocool Chunder Bhuttacharjee*, I. L. R., 6 Cal., 370; but see *Mauni Kasaundhan* vs. *Crooke*, I. L. R., 2 Alla., 296. A suit by a benameedar not the real purchaser will not lie—*Fuseelun Beebee* vs. *Omdah Beebee*, 10 W. R., 469; and under the English decision above quoted, he could not ask that the real purchaser be made a co-plaintiff, and the suit should be dismissed—*Sita Nath Shaha* vs. *Mohini Chunder Roy*, 3 C. L. R., 102. In a suit for rent defendant pleaded non-liability on the ground that he was a benameedar, and that the jote belonged to A: *held*, A should not have been made a defendant by the Court on its own motion—*Maharanee Surno Moyee* vs. *Bykunt Chunder Mustofi*, 25 W. R., 17.

In an action to recover letters patent, an applicant asserted that plaintiff had assigned ⅘ths of his interest to him and applied to be added as a plaintiff. The Court, though learning to the opinion that the affidavit in support of the application should, under section 27, *supra*, show that a *bonâ fide* mistake had occurred, granted the application under this section, Weekly Notes, 1875, p. 250. Where a Hindu widow sues in respect of rights inherited by her from her deceased husband, and afterwards adopts a son, the latter should be made a co-plaintiff—*Paravatani* vs. *Ambalavana Pillai*, 1 Mad., 197. A suit instituted by a guardian in the name of the minor was dismissed on the ground that the plaintiff had not got a certificate. On special appeal the

minor, then of age, applied to have his name entered and leave was granted—*Madhub Chunder Chowdry* vs. *Buktessuree Debia*, 12 W. R., 102. In general where the plaintiff has assigned a share in the proceeds of a suit, and the agreement is not void, the defendant can apply to have the assignee made a party—*Chander Kant Mookerjee* vs. *Ram Coomar Koondu*, 13 B. L. R., 530; L. R., 2 App. Cas., 186. But care should be taken that the nature of the suit is not changed. Where plaintiff sued for his share of the property of a person deceased, it was held the Court could not add parties, and turn it into a general administration suit—*Oh Ling Tee* vs. *Awkinfee*, 10 W. R., 86; and so where one person sues for himself and others, the names of the parties jointly interested will not be added—*De Hart* vs. *Stevenson*, Weekly Notes, 1876, p. 83. In a suit for partition the mortgagee of the plaintiff need not be made a party—*Mohendro Bhoosun Biswas* vs. *Soshee Bhoosun Biswas*, I. L. R., 5 Cal., 882. A shareholder cannot sue for a fractional portion of rent unless there has been a separate agreement or separate collections—*Dinobundhoo Chowdry* vs. *Dinonath Mookerjee*, 19 W. R., 168; *Mussamut Lalun* vs. *Hemraj Sing*, 20 W. R., 76; and he should make his co-sharers co-plaintiffs—*Tara Chunder Banerjee* vs. *Ameer Mundle*, 22 W. R., 394; possibly he could sue for his share by making them defendants—*Beharee Lall Dass* vs. *Radha Nath Dass*, W. R., 229; and under the same circumstances a co-sharer cannot enhance—*Bheekoo* vs. *Oomar Khan*, 1 Alla., 236, but see *Doorga Prosad Mytee* vs. *Joynarain Hazrah*, I. L. R., 2 Cal., 474; *Rakhal Chunder Roy* vs. *Mahtab Khan*, 25 W. R., 221, nor measure—*Santee Ram Panjah* vs. *Bykunt Paray*, 19 W. R., 280; nor can one member of a joint family sue for property belonging to himself and the others—*Gokool Pershad* vs. *Etwaree Mahto*, 20 W. R., 138.

Plaintiff having successfully sued for possession a person holding his land, subsequently brought a suit for *mesne* profits. Defendant applied under this section that the plaintiff's sister to whom he had paid the rent might be made a party. Archibald, J., held:—"The procedure of which the defendant wishes to avail himself rather contemplates the case of a defendant who is not liable, or who is to a great extent free from any default. Here the defendant is a trespasser. Why should the plaintiff be put to prove that any money was paid to Miss Lovell. If the defendant was led to believe that Miss Lovell was the person to whom the rent should be paid, and paid it under a mistake of fact, he has a simple remedy against her for money had and received, Weekly Notes, 1876, p. 53. A sues B for land; C intervenes, claiming them to be his; C should not be made a party to the suit"—*Bucha Sing* vs. *Mirza Mushook Ali Beg*, 15 W. R., 572, *Joy Gobind Doss* vs. *Gouree Proshad Shaha*, 7 W. R., 202; *Juggodanund Misser* vs. *Hamed Russool*, 10 W. R., 52. A sued the widows of B, declaring that he was entitled to 12 annas of B's estate, and asked to set aside the certificate obtained by them. C intervened, claiming a portion of the property as heir, and was made a defendant in the Lower Court; it was decided that it should not have been allowed—*Ahmed Hossein* vs. *Mussamut Khodeja*, 10 W. R., 369. In a suit between parties each contending that he is the judgment-creditor, the judgment-debtor need not be made a party—*Abdool Gunnee* vs. *Pogose*, 12 W. R., 436; there are decisions against this view—*Ram Taruck Ghosal* vs. *Radha Bullab Sircar*, 15 W. R., 97; *Bhyrubnath Tye* vs. *Mohesh Chunder Bhadooree*, 13 W. R., 169; *Joy Kishen Mookerjee* vs. *Raj Kishen Mookerjee*, 16 W. R., 101. Whether an intervenor in a rent suit should be made a party or not, is not quite settled. The latest decision is to the effect that he should not—*Lodai Mollah* vs. *Kally Dass Roy*, I. L. R., 8 Cal., 240, and probably it is impossible to lay down beforehand in what rent cases an intervenor should be made a party. In some cases a rent suit is either a suit for ejectment of the tenant or can be made the loser of it, and in ejectment suit even in England, the intervening landlord was entitled to defend the suit though not named in the writ—*Butler* vs. *Mendith*, 24 L. J., Ex., 246; Dicey on parties p. 495. The general rule is that the term "questions involved in the suit" must be taken to mean questions directly arising out of and incident to the original cause of action in which the person proposed to be joined has an identity or community of interest with one or other of the parties—*Naraini Koer* vs. *Durjan Koer*, I. L. R., 2. Alla., 738; *Kanhye Roy* vs. *Shaikh Hyder Buksh*, 25 W. R., 29; but see *Gooroo Prosunno Banerjee* vs. *Guggun Chunder Dutt*, 20 W. R., 383; see also the cases at 19 W. R., 248; 14 W. R., 334; 13 W. R., 73, 262. Thus it has been held that a Court is not competent to allow of the introduction into a suit of a person against whom no relief is sought by the plaintiff; nor has the Court any authority to receive a written statement from such person, or to permit him to appear at the hearing—*Moharanee Surno Moyee* vs. *Boykunt Chunder Mustofee*, 25 W. R., 17. See also *Horwell* vs. *London Omnibus Co.*, 2 Ex. D., 365; and in a suit for damages by the purchaser of goods by sample, an application of the vendors to have their vendor on the same samples made a party was refused—*Mahomed Badsha* vs. *Nicol Fleming*, I. L. R., 4 Cal., 355. In England the rule is that, if the plaintiff objects to the third person being introduced, the Court would consider whether the plaintiff would be prejudiced in any way, or delayed in his action by such proceeding. "The object of these enactments was to prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and defendant in the action, and as between the defendant and a third person; and in such a case the third person is to be cited to take part in the original litigation,

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and so to be bound by the decision on that question once for all. And the point really is whether there is such a question in the present case, which can advantageously be tried and decided, not only as between the plaintiffs and the defendants, but as between the defendants and the third party"—*The Swansea Shipping Co., Limited* vs. *Duncan, Fox and Co.*, 1 Q. B. D., 644. And in *Bower* vs. *Hartley*, ibid, 652, Mellish, J., said :—"If there is a material common question which it is important to have tried once for all, the Court has power to make an order that a third party shall be bound by the trial of that particular question, even though he is not interested in the whole subject-matter of the action. But this power is a discretionary one, and in the exercise of its discretion the Court ought to consider whether the plaintiff's interests will be prejudiced or affected, and, if the plaintiff will be prejudiced or delayed, the power ought not to be exercised." And James, L. J., said :—"I think that the convenience of having this question determined once for all in this action is not enough to outweigh the injury to the plaintiff which may result from the introduction of the third parties."

A sued her co-heir B, who had taken out a certificate under Act XXVII, 1860, for her share of the deceased's property. At the trial it appeared that B's agent had got possession of the property; it was held that A could follow the property into the hands of B's agent, and the agent was made a party—*Nyga Tha Yah* vs. *Mee Khan Mhone*, 13 W. R., 443. See, however, *Dhunraj* vs. *Broughton*, 15 B. L. R., 296. Where a corporate body was sued through its agent and not as a corporation, it was held that the corporation could not be affected by the result of the suit, and that an application to make it a party was properly refused—*Nobin Chunder Paul* vs. *Stephenson*, 15 W. R., 534. Where a gross fraud is being practised on a Court in the matter of a minor, any person appearing and undertaking to prove the fraud should be heard—*Hossein Ali Khan* vs. *Syud Burkut Ali*, 10 W. R., 372. Plaintiffs sued certain persons for money, one on a contract entered into by A D, as defendants' agent, defendants denied the agency. *Held*, that the name of A D could be added, and the plaint amended was to sue alternated relief against the agent—*Buddree Doss* vs. *Hoare Miller & Co.*, I. L. R., 8 Cal., 170.

At any time.—The words in Act VIII, 1859, section 73, "at any hearing of a suit," have been omitted, and applications under this section may now be made before hearing. Under Act VIII, section 73, it was held that where the Judge in appeal considered a party was necessary as respondent, he should act under this section and not dismiss the suit—*Achumbah Paurey* vs. *Ram Sahoy Pauray*, W. R., 1864, p. 136; and in one case in special appeal the High Court added a party after the suit had been properly dismissed—*Madhub Chunder Chowdhry* vs. *Buktessuree Debia*, 12 W. R., 102. Where the receiver of an estate, under permission of the Court and on behalf of the parties interested in the estate, brought a suit by mistake in his own name, it was held in appeal that, the receiver having full power to institute the suit, and no objection having been taken in the first Court, the error could be rectified without the consent of the persons interested, and that no further notice of appeal was necessary—*Juggunnath Pershad Dutt* vs. *Hogg*, 12 W. R., 117; and where a decree had been passed referring the suit to the Commissioner to take an account and sell the property, the Court held that it had power to add fresh parties to the suit—*Vakatchand Lakhmichand* vs. *Administrator-General*, 8 Bom., 96; but where a District Judge dismissed a suit with costs, and after an appeal had been preferred, he found on inquiry that others were interested, and, making them parties, ordered that their names should be added to the decree for costs, his order was set aside—*Ram Nidhee Koondoo* vs. *Ajoodhya Ram Khan*, 20 W. R., 123; and in a later case it was doubted whether persons could be added in appeal without their consent—*Watson & Co.* vs. *Hurgobind Sookul*, 22 W. R., 35. In special appeal it is a common practice in the case of minors, to strike out names and change them, or remand the case and direct them to be changed—*Krishnabhai* vs. *Sonabhai*, 2 Bom., 310; *Mongula Dossee* vs. *Saroda Dossee*, 20 W. R., 48; *Abdool Hye* vs. *Mitterjeet Singh*, 23 W. R., 348.

Practice.—An appeal lies from any order under this section striking out or adding the name of any person as plaintiff or defendant but not from an order refusing to make a person a party—*Karman Bibi* vs. *Misri Lal*, I. L. R., 2 Alla., 904. An order to strike out not being *ultra vires*, no action can now be taken under the Charter Act, as could have been—*Judooputee Chatterjee* vs. *Chunder Bhuttacharjee*, 9 W. R., 309; *Balgobind Tewari* vs. *Hareenath Pershad Sahoo*, 16 W. R., 183. If no objection is raised in the original or first Appellate Court the order cannot be made the subject of a special appeal—*Rakhal Doss Mondal* vs. *Protab Chunder Hurah*, 12 W. R., 455; *Beer Chunder Roy* vs. *Tameezoodeen*, 12 W. R., 87; *Shaikh Lal Mahomed* vs. *Shaikh Peer Nuzur*, 18 W. R., 112; and possibly if the order is not objected to at first, it cannot be contested in regular appeal—*Kewal Sahoo* vs. *Issur Dyal Roy*, 12 W R., 334. No appeal apparently lies where the Court refuses to act or to make an order; in such case the Court has a discretion which can only be interfered with on appeal from the final decision (section 591)—*Muthayammal* vs. *Tiru Mala Gaundan*, 4 Mad., 22; *Gyaram Seal* vs. *Issur Chunder Chuckerbutty*, 2 W. R., 158; *Googlee Sahoo* vs. *Premlall Sahoo*, I. L. R. 7 Cal., 148, and then only if the order has affected the decision on the merits, or the jurisdiction of the Court—*Ridhnath Sahoy* vs. *Gopee Sahoy*, 14 W. R., 90; *Koomara Opendro Krishna Deb* vs. *Nobin Krishna Bose*, 3 Ben., 113. Thus if a suit cannot proceed for want of a party such as one of several joint contractors—*Ramsebuk* vs. *Ram Lall Koondoo*, I. L. R., 6 Cal., 815, or complete justice cannot be done in his absence either as plaintiff or defendant—*Rajendronath Dutt* vs. *Shaik Mahomed Lall*, L. R., 8 Ind., App., 135, the suit should be dismissed at any stage. See, however, *Uma Sundari Dassee* vs. *Ramji Haldar*, I. L. R., 7 Cal., 242.

In a suit for rent, the defendant alleging that a person not a party had a joint interest with the plaintiff got his name put upon the record against the wish of the plaintiff. *Held* in special appeal that if added at all it should be as defendant—*Gorglee Sahoo* vs. *Prem Lall Sahoo*, I. L. R., 7 Cal., 148.

Where defendant added, plaintiff to amend.

33. Where a defendant is added, the plaint, if previously filed, shall, unless the Court direct otherwise, be amended in such manner as may be necessary, and an amended copy of the summons shall be served on the new defendant and the original defendants.

Judicature Acts, Order 16, Rules 15 and 16. This section applies to H. C. and M. S. C. C.

It has been decided that the corresponding rules in England are not applicable to an application to add a new defendant in a consolidated action—*In re Wortley*, 4 Ch. D., 180.

Time for taking objections as to non-joinder or mis-joinder.

34. All objections for want of parties, or for joinder of parties who have no interest in the suit, or for mis-joinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the first hearing; and any such objection not so taken shall be deemed to have been waived by the defendant.

This section applies to H. C. and M. S. C. C.

Objection for want of parties should be taken at the earliest opportunity and before the first hearing—*Raj Narain Bose* vs. *Universal Life Assurance Co.*, I. L. R., 7 Cal., 594. But see the case of *Modhe* vs. *Dongre*, I. L. R., 5 Bom., 609. See also note under section 32, *ante*.

Each of several plaintiffs or defendants may authorize any other to appear, &c., for him.

35. When there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding under this Code: and in like manner when there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any such proceeding.

Authority to be in writing signed and filed.

The authority shall be in writing signed by the party giving it, and shall be filed in Court.

Act VIII, 1859, section 115. This section applies to H. C. and M. S. C. C.

A decree-holder for himself, and as agent for his nephews, applied for execution of a decree passed in favour of the applicant and the father of the nephews. The application was rejected on the grounds (1) that although applicant produced a mukhtarnama authorizing him to execute the decree, it was special and on a stamp of 8 annas, and not a general power under section 17, clause 1, Act VIII, 1859; and (2) that the mukhtarnama was not produced with the application. It was held that under this section no general powers-of-attorney were necessary; and, as the mukhtarnama was filed before the Judge had passed his order, the application should have been granted—*Ambaram Harivallabh Das* vs. *Himat Singh Kalianji*, 2 Bom., 103.

By section 40, Act XX, 1865, any suitor may appear, plead and act in any suit, appeal or other proceeding on behalf of any co-suitor; but he cannot recover any fee or reward.

Recognized Agents and Pleaders.

Appearances, &c., may be in person, by recognized agent or by pleader.

36. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when otherwise expressly provided by any law for the time being

in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf:

Provided that any such appearance shall be made by the party in person if the Court so direct.

Act VIII. 1859, section 16; the last paragraph is new. This section applies to H. C. and M. S. C. C.

Recognized Agent.—Under this section a recognized agent can file an application or enter an appearance on behalf of has principal; he cannot institute or defend a suit in his own name—*Mokha Hurruckraj Joshee* vs. *Bissessur Doss*, 13 W. R., 344; nor can he address the High Court, as a suitor himself may do—*Prannath Chowdhry* vs. *Ganendro Mohun Tagore*, 3 W. R., 108.

Authorized Agent.—In the case of *Buzl-ul-Ruheem* vs. *Ramgopaul Manna*, 8 Sev., 941, it was held that, looking at clause 10 of the Charter, an authorized agent, under section 17, Act VIII (corresponding to section 37, *infra*), could not file a petition of appeal on the appellate side of the High Court, and that the Act did not apply. Section 37, *infra*, possibly does apply; see section 638, *infra*, *Meares's* case, 14 B. L. R., 106.

A suit should not be dismissed by the first Appellate Court, on the ground that the plaint has not been filed by a recognized agent; such an error does not affect the merits of the case—*Manno Dossee* vs. *Ishan Chunder Bannerjee*, 15 W. R., 245.

Pleader.—Under the Letters Patent, advocates, vakeels and attorneys appear for suitors, and plead, or act, or plead and act for them; advocates may appear and plead only. Hence, it has been held that an advocate is not entitled to file an application in the Registrar's Office of the appellate side of the High Court—*Ram Taruck Barrik* vs. *Sidhessuree Dossee*, 13 W. R., 60.

Pauper Suits.—This section does not refer to such suits (see section 404)—*Ex-parte Deogir Guru Shumbhagir*, 4 Bom., 91.

Recognized agents.

37. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

Persons holding powers-of-attorney from parties out of jurisdiction.

(*a*) persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

Certificated mukhtárs.

(*b*) mukhtárs duly certificated under any law for the time being in force, and holding special powers-of-attorney authorizing them to do, on behalf of their principals, such acts as may legally be done by mukhtárs;

Persons carrying on trade or business for parties out of jurisdiction.

(*c*) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

Recognized agents in Panjáb, Oudh and Central Provinces.

Nothing in the former part of this section applies to the territories now administered respectively by the Lieutenant-Governor of the Panjáb, and the Chief Commissioners of Oudh and the Central Provinces; but in those territories the recognized agents of parties by whom such appearances, applications and acts may be made and done shall be such persons as the Local Government may, from time to time, by notification in the official Gazette, declare in this behalf.

This section applies to H. C. and M. S. C. C.

Applications to sue in *formâ pauperis* under section 404, *post*, can not be made by recognized agent—ex-parte *Devgergaree Sumthagir*, 4 Bom., 91. A recognized agent can not sue or appear in his own name—*Mokha Harakraj Soshee* vs. *Biseswur Dass*, 5 B. L. R., App., 11; *Charter* vs. *Misree Lall*, 2 Alla., 179; *Tyaruddeen* vs. *Hurst Pudmer*, 4 Alla., 68A.

(*a*.) A general power-of-attorney requires to be stamped—See Act I of 1879, cl. 50. A warrant of attorney to the attorney of a defendant, to receive a declaration or plaint, in any action or suit to be brought for the recovery of certain moneys, and to confess the same action or suit, or else to suffer or consent to a judgment or decree in the said action or suit by default, or in any other way to pass or be pronounced against the defendant, empowers the attorney to accept service and appear for the defendants within the meaning of this section—*Khaulut Chandra Ghose* vs. *Sarada Soonderry Dossee*, Bourke, 244.

Vakalutnamahs, whether executed by principals or their attorneys or agents, and muktarnamahs, under the authority of which vakalutnamahs are executed, need not be verified on oath; the responsibility for their correctness rests with the vakils. A mukhtarnamah under seal is as valid as a muktarnamah under signature—*Petition of the Maharaja of Burdwan*, 7 W. R., 475.

As to the meaning of "resident" see note under section 16, *supra*, p. 29.

(*b*) By section 11, Act XX, 1865, mukhtars may subject to the conditions of their certificates as to the class of Courts in which they are authorized to practice, appear and act in any Civil Court, and appear, plead and act in any Criminal Court within the same limits. They cannot *plead* in Civil Courts. Merely bringing a plant to a vakil for his signature—*Muddun Mohun Biswas*, 6 W. R., Ref., 29, or standing behind a pleader and giving him information does not amount to an appearance as mukhtar in contravention of Act XX, 1865—*Gujraj Singh*, 10 W. R., 355. Previous to this Act a mukhtar was not looked on as a recognized agent—*Kristo Chunder Gooplo* vs. *Fuzl Ali Khan*, 17 W. R., 389.

A person holding a power-of-attorney authorizing him to appear and defend suits may act or not, as he pleases, upon the power. He is at liberty to refuse to accept service of summons—In re *Luchmee Chund*, I. L. R., 8 Cal., 317.

(*c*.) In Act VIII, 1859, section 17, the words "where no other agent is expressly authorized" imply that the persons so carrying on trade or business for or in the names of parties not within the jurisdiction of the Court, are purely agents; and the words "carrying on trade or business for or in the name of parties not within the jurisdiction of the Courts" refer to gomashta or agent, and not to a partner—*Luchmeput Dogare* vs. *Sibnarain Mundle*, 1 Hyde, 97. This decision was subsequently dissented from in *Ram Chundra Bose* vs. *Snead*, 7 B. L. R., App., 58, so that the point may still be considered as undetermined. These cases were decided with reference to the question whether, in an action against the firm, service of summons on a partner was sufficient. It is so now; see section 74, *infra*; but the service should be made at the place of business—*Ruston Hall* vs. *Jokeeram*, 11 B. L. R., App., 26.

Clause (*c*) of this section and section 76 are to be construed together, and are intended to carry out the same scheme of relief, which rests upon the idea that where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he should take the place of such principal (at the option of any person who has dealt with him) in any legal proceeding that may arise out of the business or work in which the agent has been virtually a local principal. The manager or agent contemplated by the Code, is one who has an initiative and independent discretion, although subject possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute, or a factor, or commission agent who is not identified with the firm for which he acts, is not such an agent—*Goculdas Dwarkadas* vs. *Ganeshlal Halasroy*, I. L. R., 4 Bom., 416.

A Bombay firm, simply employed by the owners, resident in England, of a ship visiting Bombay, to procure freight for her for a particular voyage, cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners, and therefore can not be deemed authorized agents within this section—*Ratansi Pancham* vs. *Saunders*, 8 Bom., 159. See also the case reported in the note at page 111 of vol. 7, Bombay High Court Reports.

An agent cannot act under this clause so long as his principal is within jurisdiction. Thus, where the manager of a firm instituted a suit to recover a sum of money while one of the partners was within jurisdiction, it was held that the partner and agent should have joined in presenting the plaint or appointing a pleader; but that, unless the irregularity affected the merits of the case, the Appellate Court ought not, on that account, to dismiss the suit—*Bisandas* vs. *Lakhmichand Kisanchand*, 6 Bom., 159.

A gomasta of a firm ceases to be a recognized agent as soon as the firm ceases to exist—*Mokha Hurruckhraj Joshee* vs. *Bissessur Doss*, 13 W. R., 344; but the munim of a firm which has ceased to transact business, who is engaged in collecting the assets of that firm and otherwise winding-up its affairs, is a recognized agent of the owner of such firm within the meaning of clause 2, section 17, Act VIII of 1859, and can, on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm whose affairs he is engaged in winding-up—*His Highness Turkoji Maharaja Holkar* vs. *Pitambardas Naranji*, 9 Bom., 427.

Resident:—See *Ram Chandra Sakheram* vs. *Keshao Durgaji*, I. L. R., 6 Bom., 100.

Carrying on trade or business.—See note under section 16, *supra*.

The provision regarding Panjab, Oudh, and the Central Provinces, will enable the Local Governments to keep, if they think fit, the special rules on the subject now in force in those territories, *viz.*, Notification (Panjab) No. 1225, dated 26th September 1866; and the Order of the Governor-General in Council as regards Oudh, dated August 6th, 1861.

Service of process on recognized agent.

38. Processes served on the recognized agent of a party to a suit or appeal shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

The provisions of this Code for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

This section applies to H. C. and M. S. C. C.

This section does not bar service of notice on the parties themselves—*Ram Lall Chowdhry* vs. *Soondery Shah*, W. R., 1864, Mis., 21.

Service upon an attorney's clerk of an order directed to be served on the attorney is not good—*Emritlall Saligram* vs. *Kidd*, 2 Hyde, 116.

Appointment of pleader.

39. The appointment of a pleader to make or do any appearance, application or act as aforesaid shall be in writing, and such appointment shall be filed in Court.

When so filed, it shall be considered to be in force until revoked with the leave of the Court, by a writing signed by the client and filed in Court, or until the client or the pleader dies, or all proceedings in the suit are ended so far as regards the client.

No advocate of any High Court established by Royal Charter shall be required to present any document empowering him to act.

This section applies to H. C. and M. S. C. C.

Vakalutnamas require a stamp. They may be executed by the principal or any person holding a power-of-attorney, whether enrolled as a mukhtar or not—*Shaikh Nubee Buksh*, petitioner, 7 W. R., 481, and neither the mukhtarnama under which the vakalutnama has been executed, nor the vakalutnama itself requires to be verified on oath; the responsibility of all such documents being properly executed rests with the vakils—*Maharajah of Burdwan*, petitioner, 7 W. R., 475.

The acceptance of a vakalutnama should be unconditional in all cases—*Gopeenath Mudduck*, petitioner, 14 W. R., 7.

No fresh vakalutnama is necessary to appear in any proceedings subsequent to decree, even in such as an appeal to the Privy Council—*Shah Mukhun Lall* vs. *Sreekisen Singh*, 8 W. R., 92, or an application for a new trial—*Sutto Churn Ghosal* petitioner, 12 W. R., 465, or for execution of decree, or to answer a claim put forward under section 246 of Act VIII, 1859—*Gopal Joya Chand* vs. *Har Govind Khushal*, 5 Bom., 83, or to appear in a remanded case, 4 Mad., xliii.

Service of process on pleader.

40. Processes served on the pleader of any party or left at the office or ordinary residence of such pleader, relative to a suit or appeal, and whether the same be for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents; and, unless the Court otherwise directs, shall be as effectual for all purposes in relation to the suit or appeal as if the same had been given to or served on the party in person.

This section applies to H. C. and M. S. C. C.

Service of notice of appeal upon respondent's pleader is good service on him—*Ishur Dutt Mundul* vs. *Shib Pershad Thakoor*, 15 W. R., 290. So also is service of summons calling on a party to appear and give evidence—*Shivrudrappa* vs. *Kashinath Vishnu*, 6 Bom., 141.

Agent to receive process.

41. Besides the recognized agents described in section 37, any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

His appointment to be in writing and to be filed in Court.

Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument, or, if the appointment be general, a duly attested copy thereof, shall be filed in Court.

This section applies to H. C. and M. S. C. C.

CHAPTER IV.

OF THE FRAME OF THE SUIT.

Suit how to be framed.

42. Every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.

This section applies to H. C.

Suit to include whole claim.

43. Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.

If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several remedies.

A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1881 and 1882 is due and unpaid. A sues B only for the rent due for 1882. A shall not afterwards sue B for the rent due for 1881.

This section applies to H. C. and M. S. C. C. As to the last paragraph, see the transfer of property Act (Act IV of 1882), section 99.

Cases arise where the acts complained of may not have been all done together, and yet they may give rise to only one cause of action. The leading case on this point is that of *Shamsoonissa Begum* vs. *Buzl-ul Rohim*, Marsh., 286, in which plaintiff sued for a piece of Government paper made over to defendant on a specified date, and it was contended that the suit was barred, as after the alleged act of misappropriation plaintiff had instituted a suit for the recovery of property which she had entrusted to the defendant, and that the latter suit should have been included in the former. The High Court considered, among other things, that they were separate causes of action, and decreed the claim. This decision was reversed in the Privy Council. Their Lordships said:—"In their Lordships' opinion the only ground on which (if at all) the judgment of the High Court could be sustained, is that which is somewhat doubtingly expressed by the Judges in the following sentence:—'Nor do we think that, under the circumstances of the case, the plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the defendant on a particular date.' Their Lordships think the correct test in all cases of this kind is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground. But the cause of action in the former suit of the respondent seems to them to be the refusal by the husband to restore, or his misappropriation of the wife's property, which she says she entrusted to him. There is nothing to distinguish the deposit of this particular company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present plaint to have been omitted from it for no other reason than the very insufficient one before mentioned. If she was justified in instituting a separate subsequent suit for this particular company's paper for 10,000 rupees, she would have been equally justified in making each one of the company's papers which are comprised in the property suit successively the subject of an independent suit. Their Lordships are of opinion that the ruling of the Zilla Judge on this point was correct, and that the suit was properly dismissed"—11 Moore, 604; 8 W. R., P. C., 12; Marsh., 286. The rule derived from this case is that where the parties are the same and the act is one, such as the conversion of several securities delivered at different times, there is only one cause of action.

A suit for moneys, alleged to have been misappropriated by defendant as manager of a joint family, will bar a subsequent suit for corn or other moneys misappropriated by the same defendant—*Radha Kishoree Debia* vs. *Ram Kumar Chowdhry*, 12 W. R., 79; *Ganes Chunder Chowdhry* vs. *Ram Kumar Chowdhry*, 3 Ben., 265; and a suit for unlawfully taking cattle, or for their value should include any claim for damages caused by the wrong-

ful act—*Shaik Punju* vs. *Shaik Oodoy*, 18 W R., 337 ; *Mohubut Mundul* vs. *Shoorendra Nath Roy*, 4 W. R., Ref , 20 ; a suit for demurrage on account of the detention of a boat must claim all the demurrage due—*Munghroo Manghee* vs. *Gya Ram Nundee*, 14 W. R., 253 ; a suit for mesne profits, or the value of fishes taken out of a tank, bars a subsequent suit for mesne profits before the date of the first suit—*Rookminee Kooer* vs. *Ram Tohul Roy*, 21 W. R., 223 ; *Saem Sirdar* vs. *Kamuluddy*, 22 W R., 426.

Plaintiff having gained a suit for specific performance of a contract to convey, brought a subsequent suit claiming damages at the rate of 8 per cent. on the purchase-money prematurely paid. *Held*, that the suit was barred by section 7 of Act VIII of 1859 ; and that the suit could not be considered a suit for mesne profits within section 10, Act VIII of 1859 —*Shib Kristo Dah* vs. *Abdool Sabhan*, 15 W. R., 408.

A suit against a mortgagor to establish a lien over the mortgaged property does not prevent a subsequent suit by the same party against attaching creditors of his mortgagor to declare his lien over surplus sale proceeds in the hands of the Collector assessing out of a revenue sale before the first suit—*Kristodass Koondoo* vs. *Ramkant Roy*, I. L. R., 6 Cal., 142, but a suit on account of surplus sale proceeds bars a subsequent suit for deductions from those sale proceeds on account of rent which defendant had failed to pay—*Tarinee Pershad Ghose* vs. *Khoodoo Monee Debia*, 13 W. R., 261 ; and a suit for sale proceeds as representing a putnee talook against persons wrongfully in possession, bars a subsequent suit for mesne profits or compensation—*Tarinee Pershad Ghose* vs. *Raghub Chunder Banerjee*, 13 W. R., 203. A putnidar sued his zemindar for damages for inducing him to take a talook on false representations, and obtained back a portion of the purchase-money and compensation for loss of profits. It was held that he could not, in a subsequent suit, recover the amount of so-called excess of rent paid by him under the lease, as he should have sued for all his damages in the first suit—*Nilmonee Singh Deo* vs. *Ishur Chunder Ghossal*, 9 W. R., 121.

A suit for possession of property does not bar a second suit to recover money paid as compensation under the Land Acquisition Act to the defendant after the institution of the first action—*Nund Lall Bose* vs. *Meer Aloo Mahomed*, I. L. R., 5 Cal., 597.

A party holding a decree for possession and partition, may bring a new suit for mesne profits which accrued prior to the decree—*Chowdhry Imdad Ali* vs. *Boonyad Ali*, 14 W. R., 92.

Where a plaintiff sued for and obtained damages against one of several persons who joined together in defaming his character, it was held that a similar suit by the plaintiff against another wrong-doer would not lie—*Madud Ali Khan* vs. *Saleem Ahmed Khan*, 4 Alla., 142.

In those Courts in which an heir is allowed to sue several alienees, the question may arise whether, omitting to sue any one bars a subsequent action against him, or whether though he may sue them all, he is not bound to do so. The latter seems correct. Thus, plaintiff sued to prove a right in and obtain possession of 17 villages, and to cancel certain instruments of gift and sale, but omitted to implead the mortgagees of three of those villages, or to sue to set aside the mortgage deeds. Subsequently, he brought a fresh suit to do so. A majority of the N. W. Sudder Court held that the temporary or permanent character of the alienation did not leave it optional with him to include them in, or exclude them from, his first suit ; each alienation, permanent or otherwise, was *primâ facie* equally unlawful and constituted a cause of action. But that when the plaintiff elected to sue for the whole property at once, and to avoid the alienations which jeopardized it, he was bound to sue for the avoidance of all the alienations which gave him a common cause of action. This decision was set aside by the Privy Council. Their Lordships said :—"Now the first suit as has already been shown, was brought against various defendants to impeach certain alienations made by the widow and mother of *Rao Dhuleep Sing*. They were alienations by which the inheritance, subject to the interests of those persons, was transferred to certain foster sons or near relations or dependents of the two ladies, so as to exclude the remoter heirs. The suit with which their Lordships are now dealing was brought to set aside a mortgage, which had been granted by these ladies to the respondent's ancestor in this case before the alienations which were the subject of the other suit. It no doubt appears in the description of the property which was the subject of the first suit, that three of the villages, forming part of that property, were subject to the mortgage now in question, and the name of the mortgagee is mentioned. But it appears to their Lordships that the causes of action in the two cases were essentially different ; in the one case the widow and mother, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the defendants in the first suit. In the other case the issue was, whether they had duly exercised the limited power which belongs to a Hindu female, having a Hindu female's right of inheritance in the estate, of charging the estate for certain defined purposes. The only ground upon which it can be plausibly contended that these two claims, against distinct persons and of a very distinct nature, really form part of one cause of action, is founded on the circumstance that in the first suit the defendant sued for the possession of the lands ; the argument being that mortgagees being parties then in possession, the suit for possession of the lands ought to have contained a prayer for setting aside the mortgages. It is to be observed that the suit, though in form a suit for the possession, was not properly brought and could not be properly brought at the time it was first instituted, for that purpose. The prayer for possession was, if things had remained as they were when the suit was first instituted, one which could not have been granted. But the substance of the suit really was, as has been stated in the judgment delivered in the other appeal, to have these alienations of inheritance, which, if not impeached, would have been fatal to the claim of the plaintiff as reversionary heir, set aside

and declared invalid. That object was, as their Lordships think, perfectly distinct from that which is the object o' the present suit, which is to have their mortgages declared invalid as against the person who has in the former suit established his title to the possession of the estate as heir, on the ground that they were securities which those who granted them had not the power to grant as incumbrances upon the inheritance"—*Rao Kurun Sing* vs. *Mahomed Fyzali*, S. D., N. W., 1866, p. 88; 14 Moore, 196. The rule laid down in this case is "that the true test of the proper application of this section to any particular case must be whether there has been a splitting of the cause of action," and in determining this, the Courts must be guided by the object of the suit and the issues raised in it—14 Moore, 197, 198. So in a suit for partition, a certain field in the possession of a mortgagee was not included. It was subsequently redeemed by the opposite party, and remortgaged. *Held*, that the claim was not barred by section 7, because the mortgaged land was not available for partition when the former suit was brought—*Narayan Babaji Dabholkar* vs. *Pandurang Ramchandra Dabholkar*, 12 Bom., 148. So also a suit on a mortgage bond against the mortgagors does not bar a subsequent suit to enforce the mortgage lien against subsequent mortgagees—*Bungser Singh* vs. *Sudiat Lal*, 10 C. L. R., 263.

A Muhammadan widow alienated her husband's property by two different deeds, to different persons at different times. Two suits were brought by the heirs of the deceased; the first to set aside the second alienation, the second to cancel the first. It was pleaded that section 7 barred the second suit, but a Full Bench held not, and said:—"The expression, cause of action, taken in its widest sense, includes everything that is requisite to show that the action is maintainable. Every such fact and circumstance is part of the cause of action. In another sense the expression 'cause of action' may be and perhaps is more strictly confined to the one fact or circumstance which gives the plaintiff a present right to sue—the act of alienation by a Hindu widow of the estate derived from her husband, or the breach of a contract. In whichever sense the words are interpreted in the section under consideration, we are of opinion that it cannot properly be said that in the case before us the plaintiff's cause of action against the widow and against her alienees is one and the same. As against the widow, the cause of action is based on the fact that she made an alienation of the inheritance in excess of her interest. As regards an alienee, the cause of action arises from the circumstances that the possession of a part of the inheritance is wrongfully withheld. Although the alienation may have been wrongful, it does not follow that an heir is entitled to recover possession from the alienee .. ..To apply these conclusions to the case before us, the plaintiff sued on the same title in the former and in the present suit, and the question as to the widow's right to alien arose equally in each case. But the sales were distinct, different lands having been sold at different times to different purchasers ....The Court adopts as applicable to this view.....that each alienation constitutes a distinct cause of action, and that it was not obligatory upon the plaintiffs to make each separate purchaser or mortgagee a party to the former suit upon pain of forfeiting all future right of suit against him by reason of such omission. We think that a plaintiff complies with the requirements of this section who includes in his suit all that he claims from his opponent, and that it is not requisite that he should in the same suit bring before the Court third persons who are no further interested in the principal matter in dispute than that they may have acquired, by mortgage or purchase, some claim or right to a portion of the property. Whether such a mortgagee or purchaser may not well be made a defendant in the first suit brought, and what may be the disadvantage of not framing the suit in such a mode that by one and the same decree all rights may be at the same time adjudicated, are distinct questions from the one which has been referred to us"—*Mussamut Jehun Bibee* vs. *Saivak Ram*, 1 Agra, F. B., 109. In a later case this doctrine was carried a step further. B sued for an 8 annas share in lands purchased in the name of his eldest brother, on the ground that they were members of a Hindu joint family. Subsequently, the defendants were both plaintiffs and defendants in a suit in which M sued for himself, and as heir of B, for 12 annas share—4 in his own right, and 8 on account of B—in other lands which had been bought in the name of N; it was argued that, B not having included these lands in his suit, M's right as heir was barred. Their Lordships held not. They said:—"Now Bulloram was suing in respect of property purchased in the name of Gridhur Mondul which he claimed to be joint property, in respect of which he was entitled to a share. But the present suit has to do with other property which was bought in the name of Mokoondram, at another time, and it appears to their Lordships that those are not the same cause of action, and that the present claim to property purchased in the name of Mokoondram is no part of the claim arising out of the cause of action in respect of other property purchased in the name of Gridhur"—*Ram Hurry Mondul* vs. *Mothoor Mohun Mondul*, 20 W. R., 450.

A, as plaintiff's guardian, held 8 annas in a village which she sold to M. Subsequently, A, and D the husband of M, sued trespassers for some lands in the village and got a decree. In appeal, A filed a solenamah, but the decree was upheld save as to mesne profits to A. M took out execution in 1867, and got possession of the land. Meantime, in 1862, plaintiff, attaining majority, sued his guardian and M to set aside the sale and succeeded. Afterwards he brought a second suit for his share of the land of which M had obtained possession in execution; it was held not barred, as the first suit was to set aside a specific alienation—*Ramlochun Lall* vs. *Goorpershad*, 5 Alla., 172.

A got a money decree on a mortgage bond, and then sued a purchaser of part to enforce his lien. Subsequently, he brought a second suit against the purchaser of the remainder. It was held that he might have sued, but was not bound to sue, for the whole property in one suit, since it was held by different parties under separate title-deeds—

Huree Mohun Poramanick, 15 W. R., 486: see also *Raja Ram Tewary* vs. *Luchman Pershad*, 8 W. R., 15. And although a creditor has a right to make all the property of the deceased debtor in the hands of several persons liable for the payment of his debt, he is not bound to include all of them and the whole of the property in one suit—*Purumsukh* vs. *Soobhan*, 2 Agra, 323. In a later case, the High Court in Calcutta carried the doctrine much further than any of the other Courts. Thus, where a lessee resumed certain lands according to his lease, on behalf of his landlord; but, after the expiry of his lease, retained them in his own possession, and also certain other portions of the land that had been leased to him; it was held that, though the title was the same, the cause of action to obtain the lands was not; that in one case it was that the lessee had not, as he was bound to do, given the lessor the benefit of the resumptions and injuriously retained the resumed lands; in the other, that he had improperly retained the lands leased, and that one suit did not bar the other—*Doorga Nath Roy* vs. *Roy Kalee Narain Roy*, 24 W. R., 212.

Where an auction-purchaser, entitled to be paid in one currency, sued for the amount in another, he was held barred from suing for the difference—*Meer Mahomed Soaduck Golestan* vs. *Forbes*, 5 W. R., Act X., 90.

Each instalment of rent—*Kristo Kinkur Poramanick* vs. *Ram Dhun Chettangia*, 24 W. R., 326; *Ram Sundur Sein* vs. *Krishno Chunder Gupta*, 17 W. R., 380; *Sutto Churn Ghosal* vs. *Obhoy Nund Doss*, 2 W. R. (Act X.), 31, or of money due on a bond, is a separate cause of action—*Bolakee Lall* vs. *Bungshee Singh*, 7 W. R., 309; but a suit for one instalment of rent bars a subsequent suit for any instalment due before to the filing of the plaint—*Taruck Chunder Mookerjee* vs. *Panchu Mohini Debia*, I. L. R., 6 Cal., 791.

A suit for one book debt does not bar a second suit for another, though both are payable on the same day, when they become due on different contracts—*Dyaram* vs. *Gouree Shunker*, 3 Alla., 20. As regards rent, a different rule seems to prevail in Madras A sued on a verbal agreement by which the defendant bound himself to deliver 30 kahuns of paddy in October 1866, 20 kahuns in February 1867, 30 kahuns in October 1867, and 20 kahuns in February 1868, in consideration of plaintiff permitting him to occupy certain land from April 1866, to March 1868. Defendant pleaded that there were four separate causes of action. The High Court held there was only one cause of action. The Judges said:—"Although each item in the payments stipulated for in the lease constitutes a debt, the aggregate of such items constitutes but one *cause of action*, the distinction between an agreement consisting of various items which are intended to form one entire demand on the one hand, and several distinct and independent claims on the other, being clear and undoubted. In *Grimbly* vs. *Aykroyd*, 1 Exch., 479, it was held that where one item is connected with another in this sense that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one entire demand, the plaintiff cannot split these items into separate causes of action, but must sue upon the aggregate amount. Here plaintiff was the lessor and defendant the lessee of certain lands for the term of the agricultural years 1866-68. The dealing was continuous for 2 years, and though plaintiff of course might have sued for each item or instalment of rent as it fell due, the aggregate of two or more of such unpaid instalments cannot be divided into two or more causes of action, but must be deemed one cause of action"—*Chakalinga Pillat* vs. *Kumark Virut Laham*, 4 Mad., 334. The case as reported does not show that the parties intended that one item if not paid should be united with another to form one entire demand and is not usually followed in Bengal—*Ram Soonder Sein* vs. *Krishno Chunder Goopto*, W. R., 380. See, however, *Mackintosh* vs. *Gill*, 12 B. L. R., 37. But where the real cause of action is single as regards the whole claim, two suits cannot be instituted at the same time, namely, one for the rent up to a certain date, and the other for the rent of a subsequent period—*Syed Ahmed Ally* vs. *Hay*, Suth. S. C. Ref., 63.

A suit for the recovery of a receipt, pledged as a security for an advance, does not bar a suit between the parties for a balance due on the whole account between them; for in the first case it was not necessary to go into the account, but only to see if the money advanced had been repaid—*Nawab Mehdi Ulla Khan* vs. *Mahomed Wajid Allee*, 1 Alla. 70. A suit to redeem does not bar one for mesne profits between the date of suit and execution of decree—*Baloo Gour Kishen Sing* vs. *Sahoy Fukeerchand*, 7 W. R., 364; but a suit to redeem, on the ground of the mortgagee being overpaid, bars a subsequent suit for the overpayment—*Baloji Tamar Pothai* vs. *Tamansuda Ghanyanu Goudh*, 6 Bom., 97.

Plaintiff sued for mesne profits and possession, but his suit was dismissed. He appealed only as to possession, and got a decree: *Held*, that as he was not bound to sue for mesne profit and possession this section did not bar him suing for mesne profits afterwards. The effect of section 2, Act VIII, 1859, was expressly excluded by the Court—*Pratap Chunder Burua* vs. *Rani Swarnamayi*, 4 B. L. R. (F. B.), 113.

Plaintiff sued for land and failed. It was held that he could not bring a second action by merely alleging that the Collector's order sought to be set aside was of a different date and description from that which was sought to be set aside in the former suit—*Luchman Dsas* vs. *Priag Dutt*, 2 Agra, 305. So where plaintiff sued for possession of land and failed and a month afterward brought a fresh suit, with this difference that in the first suit he alleged that two widows were dead; in the second that one was alive but incapable of inheriting being unchaste, and that a certain kabala was a forgery; the second suit was not allowed—*Abheram Dass* vs. *Sriram Das*, 3 Ben., 421.

Plaintiff's father sued to recove one-third of joint property. *Held*, plaintiff could not subsequently sue for property which had not been included in the father's suit—*Sooraj Pershad Tewary* vs. *Saheb Lal Tewary*, 3 W. R., 25; but see above, *Ram Hury Mondul* vs. *Mothoor Mohun Mondul*, 20 W. R., 450. The test between the same parties is whether the acts of dispossession are separate and distinct, though the title be the same in both suits—*Ram Soondur Shaha* vs. *Delanney*, 20 W. R., 103; *Jardine, Skinner & Co.* vs. *Shama Soonduree*, 13 W. R., 196. Plaintiff claimed two estates in two districts as belonging to her husband, alleging dispossession by the principal defendant and persons claiming under her. She got a decree in one district for the lands lying within it, and then sued in the second for the land lying within it; alleging a different act of dispossession from that alleged in the other suit. It was held that there was but one cause of action, as the object of the suit was to establish the plaintiff's husband's title, and to obtain possession of the land as his representative; that the allegation of separate acts of dispossession did not affect the case, for all the acts of ouster complained of were prior to the institution of the first suit and would not form distinct causes of action so long as they were committed by the same persons and as part of the same contest—*Jumoona Dassee Choudhranee* vs. *Bama Soonderee Dassee*, 2 W. R., 148; approved of in *Sooruj Pershad Tewary* vs. *Saheb Lal Tewary*, 3 W. R., 25. This decision has not been followed in Madras in so far as it decides that immoveable property in different districts must be sued for in the same suit; and it has been held that where the property is situated in different districts separate suits will lie, as this section was only intended to prohibit a second suit when the whole claim arising out of the cause of action was within the ordinary jurisdiction of the Court in which the first suit had been brought—*Subba Rau* vs. *Rama Rau*, 3 Mad., 376. A sued B for certain inam lands forming portion of a joint family property, and it was contended that the suit was barred, inasmuch as the plaintiff had previously sued for the joint property, but had not included the inam land. The question raised was whether, the permission of Government being necessary before the lands could be made the subject of a suit, this section applied. Holloway, J., following the above decision, said:—"There is a case at 3 H. C. R., 376, in which it was decided that where there were parcels of property within the jurisdiction of different Munsifs, all recoverable in the same right, the plaintiff was not barred because he had sued before one Munsif and recovered a part. Without saying that I should have arrived at that decision, it seems to me precisely to meet the present case. There, as here, to enable the plaintiff to comply with the provisions of the Civil Procedure Code, something more than the bare existence of the cause of action was required, and it may as well be said here as there that he was not bound to take such a step unless he chose. In deference to that decision, I think that in this case the suit should be restored to the file—*Pattaravy Mudali* vs. *Audimula Mudali*, 5 Mad., 419; 6 Mad. Jurist, 15.

The result of the foregoing cases may perhaps be stated as follows:—

(*a*) Unconnected parties may be joined as plaintiffs or defendants where there is one interest common to them all, centering in the main issue in the case.

(*b*). A plaintiff is not bound to add, as defendants, persons having no privity with others, or even persons holding under others, who have been made defendants.

(*c*). The parties being the same, and the act one—as conversion, misappropriation, illegally retaining possession—the whole claim must be put forward in one suit.

(*d*). Even where the parties are the same and the object the same, still if the transactions are several and distinct, this section will not apply.

Omit to sue for, or intentionally relinquish.—This includes accidental or involuntary omissions, as well as acts of deliberate relinquishment—*Buzloor Ruheem* vs. *Shumsoonnissa Begum*, 8 W. R., P. C., at p. 12; *Ram Churn Bundopadhya* vs. *Dropo Moyee Dossee*, 17 W. R., 122; *Bulwunt Sing* vs. *Chittan Sing*, 3 Alla., 27, which also seems to assert as a principle that if, after plaintiff has filed his suit, another cause of action arises regarding the same property, and he does not amend his plaint so as to include it, he is out of Court. A plaintiff cannot reserve his right to sue again by asserting in his plaint that he intends bringing a second suit for the portion omitted—*Mussamut Soondar Bebee* vs. *Khilloo Mull*, 2 Alla., 90.

Afterwards.—This section only bars the second suit, and not the first—*Choe Sing* vs. *Bahadoor Sing*, 1 Agra, 55; *Mussamut Soondar Bebee* vs. *Khilloo Mull*, 2 Alla., 90. If then it is held in the first suit, that there is no cause of action, it cannot bar the second—*Ram Soondur Sein* vs. *Krishno Chunder Goopto*, 17 W. R., 380.

More than one remedy.—Section 7, Act VIII, 1859, did not apply to the remedy, but only to the cause of action. Plaintiff sued on two registered mortgage bonds to enforce his charge against the mortgaged property, but got *ex-parte*, a mere money decree. It was held that he was not debarred from enforcing his lien against the mortgaged land in the hands of a purchaser—*Muluk Fuqeer Buksh* vs. *Lalla Monohur Dass*, 2 Alla., 29; and a suit for a declaration of right to and distribution of a fund, did not bar a suit for a share of the fund—*Sabeer Khan* vs. *Kalli Doss Dey*, 1 W. R., 199; though a suit for specific performance barred one for damages on account of failure to perform—*Shib Krishto Dah* vs. *Abdool Sobhan*, 15 W. R., 408. It appears that a prayer to enforce registration could not be combined with any other form of relief in the same suit—*Hakim Khadar Saib* vs. *Khadar Bibi*, 3 Mad., 149; *Sheikh Rohmutullah* vs. *Shurintollah Kagchee*, 10 W. R. (F. B.), 51; see on this case—*Krishna Behari Roy* vs. *Brajeswari Chowdranee*, L. R., 2 Ind. App., 286. It has always been the law in Bengal that where a person to whom property has been pledged for a debt, does not sue to enforce his lien against the property and only

obtains a money decree, though he cannot execute the decree to the prejudice of a subsequent *bond fide* purchaser, he may enforce his lien by a separate action—*Gopeenath Singh* vs. *Sheo Sahoy Singh*, 1 W. R., 315; *Goluck Monee Debia* vs. *Ram Soondar Chuckerbutty*, 9 W. R., 82; *Radha Gobind Surmah* vs. *Syud Umber Ali*, 15 W. R., 27; *Mowla Buksh* vs. *Bhyrab Doss*, 5 W. R., 115; *Bindabun Chunder Shaha* vs. *Janee Bibi*, 6 W. R., 312; *Achambit Thakoor* vs. *Choonee Lall*, 10 W. R., 27. See on this subject—*Syud Emam Momtazooddeen* vs. *Raj Coomar Dass*, 14 B. L. R., 408, and *Narsidas* vs. *Joglekar*, I. L. R., 4 Bom., 57. It is not certain how far this procedure will continue under the new Code—*Grish Chunder Mookerjee* vs. *Ramessuree Debia*, 22 W. R., 308; but it has been decided that a mortgagee does not in this country lose his lien by charging his debt into a judgment debt—*Jonmejoy Mullick* vs. *Dossmoney Dossee*, I. L. R., 7 Cal., 714; 8 Cal., 700; but see the—*European Cent. Ry. Co.*, 4 Ch. D., 33. If a plaintiff mortgagor from negligence or other cause omits to prefer the portion of his claim which would charge the mortgaged property, or having preferred it accepts a mere money decree, a subsequent suit to charge the land is barred—*Muluk Fuqeer Buksh* vs. *Lalla Mandhun Doss*, 2 Alla., 29; *Hassakh* vs. *Meghraj*, I. L. R., 2 Alla., 345; *Gumani* vs. *Ram Padarath Lal*, id., 839, and the general rule is that plaintiff should join all causes of action when they accrue at the same time and in respect of the same subject-matter—*Mohan Lal* vs. *Ram Dyal*, id. at p. 849. See note on section 206 post, as to money decree.

In the mofussil a suit against an agent for a declaration to account does not bar a subsequent suit for the amount found due—*Gobind Mohun Chuckerbutty* vs. *Sheriff*, I. L. R., 7 Cal., 169; *Kalidhun Chuttopadhya* vs. *Shiba Nath Chuttopadhya*, I. L. R., 8 Cal., 483.

Where the holder of a bond in which property is hypothecated brings a suit for all his remedies and obtains a decree which is unfructuous on account of the Court's want of jurisdiction over the land, he can bring a second suit to enforce the unfructuous part of the decree against a third party—*Grish Chunder Mookerjee* vs. *Ramessuree Debia*, 22 W. R., 308, and see *Bungshee Sing* vs. *Sudist Lal*, 10 C. L. R., 263.

This section applies to the case of a party applying to have an arbitration award filed—*Grish Chunder Chooramonee* vs. *Brojonath Bhuttacharjee*, 20 W. R., 56; and to revenue suits—*Purbhoo Tewaree* vs. *Ramjeawan Patuck*, 1 Alla., 119; *Ram Soondar Sein* vs. *Krisno Chunder Goopto*, 17 W. R., 380.

Only certain claims to be joined with suit for recovery of land.

44. *Rule a.*—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—

(*a*) claims in respect of mesne profits or arrears of rent in respect of the property claimed,

(*b*) damages for breach of any contract under which the property or any part thereof is held, and

(*c*) claims by a mortgagee to enforce any of his remedies under the mortgage.

Claims by or against executor, administrator or heir.

Rule b.—No claim by or against an executor, administrator or heir as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Judicature Acts, Order 17, Rules 2, 5. This applies to H. C. and except Rule *a*, to M. S. C. C.

An objection for mis-joinder of causes of action must be taken in the Court of first instance—*Dhandiba Krisnaji Patel* vs. *Ram Chunder Bhagbut*, I. L R., 5 Bom., 534.

As to when application for leave should be made, see *Pitcher* vs. *Hinds*, 11 Ch. D., 492.

(*a*).—This clause refers to a suit formed upon an existing title in which the plaintiff asks for a declaration of such title or for possession—*Brown* vs. *Cutts*, 5 C. L. R., 487; I. L. R., 6 Cal., 328. In England it has been held that a suit for foreclosure is not a suit for and under this section, and leave has been given to join in one suit claims for the adminis-

tration of the trusts of a mortgage deed, and for foreclosure of the mortgage—*Tarrell* vs. *Slate Company*, 3 Ch. D., 629; but see as to the Indian practice, pp. 28-32, *supra*. In England an action "to establish title to land" but not claiming possession is not an action for land—*Gadhill* vs. *Hunter*, 14 Ch. D., 492; this case has been specially provided for in this section. A suit for specific performance of an agreement to sell a share of a house may be joined with a suit to recover a sum of money due from a defendant on promissory notes—*Cutts* vs. *Brown*, 7 C. L. R., 171; I. L. R., 6 Cal., 328.

Leave will be given to join whenever it is sought to recover immoveable and moveable property comprised in the same instrument. Thus leave has been given to join in one suit, claims for recovery of possession of land, an injunction to restrain the defendants from receiving the rents of the land, the appointment of a receiver, delivery up and cancellation of a deed under which the defendant claimed to be entitled to the land sought to be recovered —*Cook* vs. *Enchmarch*, 2 Ch. D., 111. Claims for the administration of personal estate and to establish a title to real estate have been joined, where both estates rested on a common gift in the same will—*Whetstone* vs. *Devis*, 1 Ch. D., 99.

Under the old procedure a suit was allowed for the recovery of a sum contracted, for cancellation of a kistbundee alleged to have been executed under duress, and for a sum of money deposited on account of the kistbundee—*Kinnoo Monee Debia* vs. *Shohoram Sirkar*, 3 W. R., 128; for a julkur, or land, with mesne profits—*Mussamut Jossoda Koonwar* vs. *Gourie Byjonath Sohae Sing*, 6 W. R., 139; *Huro Chunder* vs. *Issur Chunder Roy*, id., 297; or a house *plus* the rent—*Jugo Mohun* vs. *Money Lal Chowdhry*, 11 W. R., 542; and claims against the same person might be joined and tried by a Judge, although the value of one of the items was below the amount cognizable by him—*Luchmee Pershad Doobey* vs. *Mussamut Kallassoo*, Ben. F. B. R., 620.

(*b*).—The meaning of the clause is this:—In suing an executor or administrator it frequently becomes a question whether he should be sued as legal representative or personally, and the minds of the framers of that rule were directed to *Ashby* vs. *Ashby*, 7 B. & C., 444, and cases of the same class—see *Farhall* vs. *Farhall*, L. Rep., 7 Ch., 123—where the executor or administrator has been dealing with the assets, or making contracts, in the course of the administration, properly and fairly in his character of executor or administrator; and then it becomes a question whether the contracts being personally entered into by him, he should be sued in his character of legal personal representative, or in his personal character, being left afterwards to get payment, if he could, out of the assets, in the course of administration. The object of the clause was to get over such difficulties. The rule is one of a series of rules allowing different causes of action to be combined together, and they are guarded by certain restrictions. Thus, by the 8th Rule of Order XVII (section 46):—"Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time (before issues are settled) apply to the Court or Judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding." And rule 9 (section 47) provides:—"If on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot be conveniently disposed of in one action, the Court or a Judge may order any of such causes of action to be excluded, and may direct the statement of any claim . ... to be amended accordingly, and may make such order as to costs as may seem just"—*Padwick* vs. *Scott*, 2 Ch. D., 743. See also *Smith* vs. *Richardson*, 4 C. P. D., 112.

Plaintiff may joint several causes of action.

45. Subject to the rules contained in chapter II and in section 44, the plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant, or the same defendants jointly, may unite such causes of action in the same suit.

Court may order separation.

But if it appear to the Court that any such causes of action cannot be conveniently tried or disposed of together, the Court may, at any time before the first hearing, of its own motion or on the application of any defendant, or at any subsequent stage of the suit, if the parties agree, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

When causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit, whether or not an order has been made under the second paragraph of this section.

Judicature Acts, Order 17, Rule 1. This section applies to H. C. and M. S. C. C.

This section is meant to meet cases in which there are many persons interested and many interests involved, and to give the Courts power once for all to dispose of those cases and of all the interest of the several parties—*Cox* vs. *Barker*, 3 Ch. D., 369 Any abuse of the power can be met by ordering separate trials under this section, or striking out causes of action under sections 46 and 47.

The present procedure may be different from that under Act VIII, where separate trials were only allowed in suits in which the causes of action were by and against the same parties—*Prahlad Sein* vs. *Mussamut Gopee Bebee*, 4 Alla., 40; *Kosella Koer* vs. *Beharee Patuck*, 12 W. R., 70, &c.

Where plaintiff joined in one suit a claim against A, with a distinct claim against A, B, and C jointly. *Held*, that the proper way to try such a suit was to proceed with the joint claim, and exclude the separate claim against A entirely from consideration—*Ram Coomar Mytee* vs. *Kumar Narain Doss*, 20 W. R., 482. If a plaintiff has got a decree for possession against several parties, severally in possession, he cannot join them as defendants in a subsequent suit for mesne profits—*Koondon Lall* vs. *Rae Himmut Singh*, 3 Alla., 86; otherwise, if the several parties have been in joint possession—*Suttya Nundo Ghosal* vs. *Suroop Chunder Doss*, 14 W. R., 76; so in a suit for possession of certain land under a lease as against the person to whom a similar lease was subsequently granted, and also for registration of the lease and for damages as against the lessor, it was held that the three causes of action were improperly joined—*Prabhuram Hazra* vs. *Robinson*, 3 B. L. R., App., 49.

Where a suit against a number of defendants on the allegation of dispossession was dismissed for multifariousness by a Judge, on the ground that the ouster was made on different dates and by different defendants. *Held*, that the Judge was right, and that he was not compelled to order separate trials on his own motion—*Ranee Surut Soonduree Debia* vs. *Soorja Kant Acharjee Chowdry*, 31 W. R., 197.

A stranger to a contract of which specific performance is sought, cannot be a party to the suit—*Lukhum Dey* vs. *Fagulla*, I. L. R., 5 Bom., 177.

Consolidation of Suits.—Plaintiff purchased 7 annas of a tenure and sued for enchancement. He afterwards purchased the remaining 9 annas and instituted another suit for enhancement of that. That cases having been set down for hearing it was held that the lower Court was right in consolidating the two suits and trying them as one—*Enayetoollah* vs. *Radha Churn Roy*, 15 W. R., 395.

The plaintiff sued for possession of a house and for rent, which were two causes of action that could be properly joined; the suit was properly brought in the Court of the Munsiff, as the Small Cause Court, which could try the suit for rent, could not give all the relief sought—*Jagomahan Sahu* vs. *Mani Lall Chowdhry*, 3 B. L. R., App., 77.

Where several plaintiffs instituted separate suits against the same defendant in respect of the same subject-matter, *Held* that the proper course was to consolidate the suits, and try them as one, as the defendant requested, or to try each case separately on the merits; and that it was wrong to try only one case, and treat the others as governed by it—*Nehal Sing* vs. *Syud Ali Ahmed*, 15 W. R., 110.

This section does not require that the plaintiff should file separate plaints in each case separately tried. No such order should be made—*Mussamut Rutta Bebee* vs. *Dumree Lal*, 2 Alla., 153.

An Appellate Court, in Regular Appeal, had power under section 37, Act XXIII of 1861, to order separate trials—*Shoroop Chunder Paul* vs. *Mothoor Mohun Paul Chowdhry*, 4 W. R., 109; and probably the same power is given under this Act. See section 582.

Appeal.—Where separate trials are ordered, it appears that the order should be looked on as directing the institution of a new suit in each case, and the Court to which the appeal lies will be determined by the amount in dispute in each trial—*Mussamut Rutta Bebee* vs. *Dumree Lal*, 2 Alla., 153; *Ram Coomar Das* vs. *Bidho Mookhee Dassee*, 15 W. R., 31.

Stamps:—See section 17 of the Courts Fee Act, and *Malchand* vs. *Shib Churn Lal*, I. L. R., 2 Alla., 676; *Chedi Lal* vs. *Kerath Chand*, id., 682; *Kishori Lal Roy* vs. *Shorut Chunder Mozumdar*, 10 C. L. R., 359.

Defendant may apply to confine suit.

46. Any defendant alleging that the plaintiff has united in the same suit several causes of action which cannot be conveniently disposed of in one suit may at any time before the first hearing, or, where issues are settled, before any evidence is recorded, apply to

the Court for an order confining the suit to such of the causes of action as may be conveniently disposed of in one suit.

This section applies to H. C. and M. S. C. C. See note *b.*, section 44, *ante.*

Court on hearing application may exclude some causes and order amendment.

47. If, on the hearing of such application, it appears to the Court that the causes of action are such as cannot all be conveniently disposed of in one suit, the Court may order any of such causes of action to be excluded, and may direct the plaint to be amended accordingly, and may make such order as to costs as may be just.

Every amendment made under this section shall be attested by the signature of the Judge.

CHAPTER V.

OF THE INSTITUTION OF SUITS.

Suits to be commenced by plaint.

48. Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

This section applies to H. C. and M. S. C. C.

Where a plaint was presented on the 29th, and the endorsement said it was accepted on the 31st, the 29th and not the 31st was considered the day of institution—*Young* vs. *Mac Corkindale*, 19 W. R., 159.

A plaint may be received and admitted on Sunday or any other holiday—*Ununta Ram Chatterjee* vs *Protab Chunder Shiromonee*, 16 W. R., 230; but there is no necessity to do so; for under the Limitation Act, if the period of limitation expires when the Courts are closed, the suit may be admitted on the day that the Court re-opens. In the North-West a plaint must be presented in office; and where a suit was admitted by a Munsiff at his private residence after he had left office, it was considered as filed on the following day when the Court re-opened—*Jai Kuar* vs. *Heera Lal*, 7 Alla., 5; but in lower Bengal a plaint delivered at the private residence of the clerk of a Small Cause Court has been held to have been properly filed—*Mudden Mohun Chuckerbutty* vs. *Fakeer Biswas*, Suth., S. C. Ref., 36. The Nazir of a Small Cause Court is not authorised to receive plaints; they cannot be filed with him—*Raj Chunder Gope* vs. *Joogul Gope*, 18 W. R., 272.

When a plaint, already filed, is returned to be amended, and again returned, or filed in another Court, the date of the suit must be taken to be the date on which the plaint was originally filed—*Mengar Munder* vs. *Horee Mohun*, 23 W. R., 447; *Khellat Chunder Ghose* vs. *Nusseebunnissa Bibee*, 16. W. R., 37; and so where a plaint improperly stamped is given back to have a proper stamp affixed and be returned, the date of the suit is the date on which it was first filed—*Mussamut Bebee* vs. *Syud Yusuf Ali*, 6 Alla., 139. See also *Skinner* vs. *Orde*, I. L. R., 2 Alla., 241; *Ram Sahai Sing* vs. *Maniram*, I. L. R., 5 Cal., 810; *Khem Karan* vs. *Har Dyal*, I. L. R., 4 Alla., 37.

North-West.—Plaints should be first filed with the clerk of the Court to report whether the necessary conditions as to the stamp, time, accompaniments and the like have been duly attended to; the petition should then be returned to the pleader or party to present to the Court for admission—2 Civ. L. (N. W.), 1872.

Where a plaint under Act X, 1859, was presented to an Assistant Collector, and not to the Collector, all subsequent proceedings were declared invalid, and the plaint was returned to be properly filed—*Roopa* vs. *Anwarali*, 4 Alla., 35; in Bengal the proceedings are voidable at the option of the defendant only—*Mackintosh* vs. *Kashee Nath Biswas*, 21 W. R., 450. No plaint should ordinarily remain unregistered for more than one day, for it is the duty of every Judge to take up, at latest on the day following their presentation, all plaints filed in his Court—Sud. Civ. O. (N. W.), 1865; 11 Civ. Cir. (N. W.), 1865.

The Court.—When the Court of a Subordinate Judge is temporarily closed, the Court of the District Judge does not become the Court of first instance in which the origi-

nal suit should be filed—*Ramaya Elapa* vs. *Muhamadbhai*, 10 Bom., 459, *Motilal Ramdas* vs. *Jamnadas Javerdas*, 2 Bom., 40; and see note under section 5.

Language of plaint.

49. The plaint must be distinctly written in the language of the Court; provided that, if such language is not English, the plaint may (with the permission of the Court) be written in English; but in such case, if the defendant so require, a translation of the plaint into the language of the Court shall be filed in Court.

This section applies to H. C. and M. S. C. C.

There is no rule which requires as much as possible of the substance of the plaint to be engrossed on stamped paper; and, so long as the rule in Bengal Government notification of 1st of July 1872, against the use of a larger number of stamps than is absolutely necessary has been complied with, it not material whether the plaint be taken to commence or end on the plain paper—*In the matter of the Land Mortgage Bank*, 18 W. R., 326.

A suit by a shareholder to set aside a sale of the whole property must bear a stamp to cover the value of the whole property—*Unnoda Pershad Roy* vs. *Erskine & Co.*, 21 W. R., 68.

A document referred to in the plaint is not necessarily a part of the plaint—*Foulton* vs. *Gwyther*, 1 Bourke, 273.

Particulars to be contained in plaint.

50. The plaint must contain the following particulars:—

(*a*) the name of the Court in which the suit is brought;

(*b*) the name, description and place of residence of the plaintiff;

(*c*) the name, description and place of residence of the defendant, so far as they can be ascertained;

(*d*) a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose;

(*e*) a demand of the relief which the plaintiff claims; and

(*f*) if the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished.

In money-suits.

If the plaintiff seeks the recovery of money, the plaint must state the precise amount, so far as the case admits.

In a suit for mesne profits, and in a suit for the amount which will be found due to the plaintiff on taking unsettled accounts between him and the defendant, the plaint need only state approximately the amount sued for.

Where plaintiff sues as a representative.

When the plaintiff sues in a representative character, the plaint should shew, not only that he has an actual existing interest in the subject-matter but that he has taken the steps necessary to enable him to institute a suit concerning it.

Illustrations.

(*a*) A sues as B's executor. The plaint must state that A has proved B's will.

(*b*) A sues as C's administrator. The plaint must state that A has taken out administration to C's estate.

(*c*) A sues as guardian of D a Muhammadan minor. A is not D's guardian according to Muhammadan law and usage. The plaint must state that A has been specially appointed D's guardian.

Defendant's interest and liability to be shewn.

The plaint must shew that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Illustration.

A dies, leaving B his executor, C his legatee, and D a debtor to A's estate. C sues D to compel him to pay his debt in satisfaction of C's legacy. The plaint must shew that B has causelessly refused to sue D, or that B and D have colluded for the purpose of defrauding C or other such circumstances rendering D liable to C.

Grounds of exemption from limitation law.

If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaint must shew the ground upon which exemption from such law is claimed.

This section applies to H. C. and M. S. C. C.

(*b*).—A corporation should sue in its own name—*Ram Dass Sein* vs. *Stephenson*, 10 W. R., 366; an unregistered or unincorporated company must disclose the names of its members when suing—*Koylash Chunder Roy* vs. *Ellis*, 8 W. R., 45; but such of the members as are minors can neither sue, nor be joined as co-plaintiffs, in their own names—*Pitum Dass* and *Gouree Dutt* vs. *Ram Dhone Dass*, 1 Taylor, 279.

To describe the plaintiff as "A, B, an infant, residing in Chitpore Road in the Town of Calcutta," is not a sufficient description of his place of abode under section 50 of the Civil Procedure Code; nor is it sufficient under that section to describe the defendant as "formerly of Calcutta," without alleging that the plaintiff has been unable to ascertain his place of residence more definitely—*Bibee Soloman* vs. *Abdool Aziz*, 4 C. L. R., 366.

When a person sues on behalf of his principal under a power-of-attorney, the principal's name should appear as plaintiff—*Choonee Sookul* vs. *Hur Pershad*, 1 Alla., 277. By section 24, Act VIII (B. C.), 1869, surburakars and teshildars can institute suits for rent, but the zemindar's name, and not their own names, must be entered as plaintiff—*Ladlee Pershad* vs. *Gunga Pershad*, 4 Alla., 59. Suits for property should be brought in the name of the real, and not in the name of the colourable owner—*Tamaoonnissa* vs. *Woojjul Monee Dossee*, 20 W. R., 72; and in suits for redemption all the mortgagors must be parties—*Ram Baksh Singh* vs. *Ramlall Dass*, 21 W. R., 428.

Where the plaintiff has sold his rights during the pendency of his suit, it is irregular to substitute for his name that of the purchaser, but it is an irregularity that can be cured by the consent of the defendant—*Beer Chunder Roy Mahapator* vs. *Shaikh Tumezuddeen*, 12 W. R., 87; 3 B. L. R., 214.

It should be borne in mind that incompetency to bring a suit is a defect not admitting of cure, and that a Court is bound to consider such an objection, though urged for the first time orally in special appeal—*Radha Kishen* vs. *Bakhtawur Lall*, 1 Agra., F. B., 175.

(*c*.)—The description contemplated by the Code, includes all the titles by which the party is generally known; and if a party from obstinacy, or pique, or anything in fact but a *bonâ fide* dispute as to the right to a title, persistently refuses to give his adversary that title by which he is generally recognized, the Court ought not to permit nor sanction that species of insult. Defendant objected that his titles were not set forth, and asked that he might be described as in the Government Gazette "The Honorable Maharajah Meerja Vijaya Rama Gujaputi Raz Mane Sultan Bahadur, Guru of Vizianagram," and plaintiff was granted a week to amend, but did not. It was held by the Privy Council, overruling the High Court, that, with the exception of the word "Honourable" which seemed less a matter of description than an honorary distinction, as it applied to the Members of Council, the Judge was right in insisting on the titles, and in rejecting the plaint on non-compliance, as the titles could not be rationally disputed—*Raja Sita Ram Krishna* vs. *Raja Vijaya Rama*, c., 3 Mad., 31; 18 W. R., 301. In this case their Lordships disapproved of the case of *Kishen Chand Goleecha* vs. *Meghraj Kobhria Roy Bahadoor*, 12 W. R., 450, in which the High Court at Calcutta refused to insist on the insertion of the words "Roy Bahadur."

A corporate body should be sued in its corporate name. A suit against "A B," agent of the corporation, is bad—*Nabeen Chunder Paul* vs. *Stephenson*, 15 W. R., 534; *Mohendranath Mookerjee*, Overseer, 9 W. R., 206; so in a suit against A B, proprietor of an estate, A B and not his karendah should be the defendant—*Madho Ra Apav* vs. *Thakoor Pershad*, 4 Agra, 127. In the case of an unincorporated or unregistered company, the names of the persons composing it must be set forth as a rule; but if the plaintiff cannot find out the names, he may sue the company in the name in which they are carrying on business, stating his inability to give a better description—*Koylash Chunder Roy* vs. *Ellis*, 8 W. R., 45; *Cannan* vs. *Koylash Chunder Roy*, 25 W. R., 117. See also chapter XXIX, *infra*.

A mortgagee, suing to enforce his lien, should make every person in possession a party—*Ram Yad Singh* vs. *Lala Saligram Singh*, 16 W. R., 98.

Where a suit is brought to obtain a settlement of a chur, to obtain a declaration of title with possession, and to set aside a settlement of the chur made with the defendant; *held* that the Government should be made a party—*Krishno Lall Nag* vs. *Bhyrub Chunder Deb*, 22 W. R., 52; *Mahomed Israil* vs. *Wise*, 21 W. R., 327.

For suits against the Secretary of State, see chapter XXVII, and for suits against minors, see chapter XXXI.

(*d*)—The plaint must include all the grounds on which the plaintiff can succeed—*Premanund Gossamee* vs. *Ram Churn Deb*, 20 W. R., 482; *Denobundhoo Chowdhry* vs. *Kisto Monee Dossee*, I. L. R., 2 Cal., 152. The different titles should be set out in the alternative, otherwise the title which has been put forward will alone be put in issue, and if the plaintiff is not successful, a second suit will be barred (id., *Lukkee Kant Doss Chowdhry* vs. *Sumeerooddi Tustar*, 21 W. R., 209; but alternative and inconsistent titles are not allowed. Thus a person may base his suit on a mortgage and a deed of sale—*Ramgutty Sarmuh* vs. *Abdool Ali*, 20 W. R., 73; or base a claim to land on a hereditary right, and also on right of occupancy—*Woodee Singh* vs. *Buldeo Singh*, 21 W. R., 12; but a claim to property as the property of the plaintiff is inconsistent with his claiming it by prescription, and in such a case the Court should call on him to elect—*Bijoy Keshub Roy* vs. *Obhoy Churn Ghose*, 16 W. R., 198; but see *Ameeroonissa Bibi* vs. *Woomarooddeen Mahomed Chowdhry*, 14 W. R., 49.

A suit to fix a boundary should shew that the boundary has been transgressed—*Ameerunnissa Begum* vs *Gopal Sahoo*, 22 W. R., 134.

In suit for land in Bengal the boundaries need not be stated in the plaint if the description given is sufficient for its identification—*Aftabooddeen* vs. *Shamsooddeen Mullik*, 18 W. R., 461; but see against this opinion—*Mahomed Ismail* vs. *Lalla Dhunder Kishore Narain*, 25 W. R., 39. In the North-West the fields are numbered and their position is given—*Fyz Ahmed Khan* vs. *Gunga*, S. D., N. W., 1857, p. 112.

In a suit for damages, the nature of the injury should be set out—*Mohesh Chunder Mookerjee* vs. *Ramdhun Pal*, 13 W. R., 248; and in a suit for a declaratory decree, the title and the circumstances requiring the declaration should be set forth—*Syud Khadim Ali* vs. *Mussamut Nazeer Begum*, 3 Alla., 262.

In suits to recover possession, the date of dispossession must be given as accurately as possible—*Boydonath Surmah* vs. *Ojan Bibee*, 11 W. R., 238; and every suit must shew that the cause of action has arisen within the period allowed by the law of limitation. A plaint to set aside an award must definitely state some fraud, or other malpractice of the opposite party—*Hurchurun Doss* vs. *Hazam Mull*, 1 Ind. Jur., O. S., 12.

(*h*).—Objections for want of description should be taken at the earliest opportunity and before first hearing—*Raj Narain Bose* vs. *Universal Life Assurance Company*, I. L. R., 7 Cal., 594. Where the executors of a Hindu sued on a contract and it was objected that the heirs should be added the objection was overruled, and the plaintiffs recovered in their representative character, *id.*, see also—*Brojonath Dey Sirkar* vs. *Andomoyi Dasi*, 8 B. L. R., 208.

The general prayer will support an injunction—*Kristo Moheney Dossee* vs. *Kally Prosonno Ghose*, I. L. R., 6 Cal., 485.

Plaints to be signed and verified.

51. The plaint shall be signed by the plaintiff and his pleader (if any), and shall be verified at the foot by the plaintiff or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case:

Provided that if the plaintiff is by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him in this behalf.

This section applies to H. C. and M. S. C. C.

On the original side of the High Court one member has under the old practice, been allowed to verify the plaint for the firm—*Luchlan* vs. *Sheikh Abdullah*, 5 Ben., App., 89;

but this case was overruled. See "Englishman," 9th of March 1874; and a co-plaintiff added must verify the plaint, unless the facts are admitted—*Roy Mohan Lal Mittra* vs. *Bishnu Chunder Chatterjee*, 1 B. L. R., 100.

A plaint signed by an authorized agent—*Maharanee Surnomoye* vs. *Poolin Behary*, 3 C. L. R., 15; *Roy Dhunput Singh* vs. *Jhoomuck Khawas*, 3 C. L. R., 579; or by a person holding a general power-of-attorney to sue on behalf of the plaintiff, is properly signed within the meaning of the proviso in this section—*Kastolino* vs. *Rustomji Dadathai*, I. L. R., 4 Bom., 468.

Contents of verification.

52. The verification must be to the effect that the same is true to the knowledge of the person making it, except as to matters stated on information and belief, and that as to those matters he believes it to be true.

Verification to be signed and attested.

The verification shall be signed by the person making it.

This section applies to H. C. and M. S. C. C.

The Courts are bound to see that plaints are verified by the plaintiffs, unless when unable to do so by reason of absence or any good cause, when they may be allowed to be verified by competent persons—*Keenoo Singh Roy* vs. *Eshan Chunder Roy*, 6 W. R., 213; *Rajah Lelanund Sing*, Petitioner, 7 W. R., 168; *Jardine, Skinner & Co.* vs. *Moharanee Shurno Moyee*, 24 W. R., 215; and, if the plaint is filed by any person other than the plaintiff, to see that the verification has been actually signed by the plaintiff—*Nursing Deb* vs. *Rammohun Mookerjee*, Marsh., 176.

As to the practice of the High Court when a suit is brought by a firm, see the case of *Ram Chunder* vs. *Choomeelal*, 12 Bom., 35.

Where a plaint is subscribed and verified by a person other than the plaintiff, notice should be given to the defendant; nothing more formal need be done by way of notice to support an application for the admission of the plaint, if the person verifying it is in other respects qualified—*Sreemutty Puddomoney Dossee* vs. *Shama Churn Chuckerbutty*, 1 Ind. Jur., N. S., 226.

Applications in favour of persons unable to verify should be pleaded, considered, and decided in each case—*Maharajah Muhessur Buksh Sing*, petitioner, 5 W. R., Mis., 33; *Raja Nursing Deb* vs. *Ram Mohun Mookerjee*, Marsh., 176; *Maharajah Muhessur Buksh Singh* vs. *Seo Narain Singh*, 6 W. R., Mis., 59; notice of them should be given to the other side; but it is not absolutely necessary to do so—*Finlay, Campbell & Co.* vs. *F. Steale*, 1 Ind. Jur., N. S., 39. Where a plaint has been verified by a person who has not shewn the Court that he is competent to verify it, the Court has removed it from the file—*Overend, Gurney & Co.* vs. *Steale*, 1 Ind. Jur., N. S., 39; but if once verification by an agent has been sanctioned, the Court, it seems, cannot of its own motion object to it afterwards—*Rajah Sutto Churn Ghosal* vs. *Surroop Chunder Doss*, 12 W. R., 465; but the Appellate Court may require the omission to be supplied—*Gokul Chunder* vs. *Mussamut Bureek Begum*, Marsh., 344.

In all cases the person verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the observation of others—In the matter of *Upendro Lal Bose*, I. L. R., 6 Cal., 675.

When the plaint alleges matter which cannot be personally known to the person making the verification, and which is not stated to be on information and belief, a verification which does not distinguish how much is true to the knowledge of the person making it, and what is alleged to be true on information and belief does not fulfil the requirements of section 52—*Bibee Solomon* vs. *Abdool Aziz*, 4 C. L. R., 366.

When the plaint is verified by a person other than the plaintiff, the Court must be satisfied that he is acquainted with the facts of the case; but in the case of a person holding a general power-of-attorney, or of any other recognized agent, the Court will not insist on any extreme stringency of proof—*Kastolino* vs. *Rustomji Dadabhai*, I. L. R., 4 Bom., 468.

The section does not require the verification of a plaint to be made in the presence of an officer of the Court; but, having regard to the necessity of satisfying the Court that the person, other than the plaintiff, who verifies the plaint is acquainted with the facts of the case, it is desirable that a verification by such a person should

be made in the presence of the Court, unless the Court be satisfied that there is sufficient ground for dispensing with his attendance—*Kastolino* vs. *Rostomji Dadabhai*, I. L. R., 4 Bom., 468.

Objections to verification should be taken before the defendant has filed his written statement; after that the case should be disposed of on the merits, and not dismissed for false verification—*Sama Soonduree Debia* vs. *Rohimuddin Sirdar*, 24 W. R., 71; and if there be any informality in the verification, the case should not be dismissed; but should proceed on the written statement, provided it contain the same allegations as the plaint—*Manooram Shaw* vs. *Hurry Pershaud Roy*, Bourke, 162; if not, the Judge before dismissing should require the verification to be supplied—*Gokul Chunder* vs. *Mussamut Bureck Begum*, Marsh., 344.

When the plaint may be rejected, returned for amendment, or amended

53. The plaint may, at the discretion of the Court, and at or before the first hearing, be rejected, returned for amendment within a time to be fixed by the Court, or amended then and there, upon such terms as to the payment of costs occasioned by the amendment as the Court thinks fit,

(*a*) if it does not state correctly and without prolixity the several particulars hereinbefore required to be specified therein; or

(*b*) if it contains any particulars other than those so required; or

(*c*) if it is not signed and verified as hereinbefore required; or

(*d*) if it does not disclose a cause of action; or

(*e*) if it is not framed in accordance with section 42; or

(*f*) if it is wrongly framed by reason of non-joinder or mis-joinder of parties, or because the plaintiff has joined causes of action which ought not to be joined in the same suit.

Proviso.

Provided that a plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character.

Attestation of amendment.

When a plaint is amended, the amendment shall be attested by the signature of the Judge.

Act VIII, 1859, section 29, *et seq.* This section applies to H. C. and M. S. C. C.

The object of a plaint is to bring the matter in dispute between the parties before the Court, but upon settlement of issues the Judge is to ascertain what is the real question to be tried, and at the hearing if he can, either upon the issues already framed or upon amended issues, determine that question he ought to do so. So where in a plaint it was stated that the defendant entered into a contract with the plaintiffs for the purchase of seed, but, on examination of the plaintiff, it appeared that no such contract was entered into, but that the plaintiff agreed to buy for the defendant as his agent, it was held that the suit should not have been dismissed, but that it should have been tried on the merits—*Abbuthnot* vs. *Betts*, 6 B. L. R., 373; 14 W. R., 181.

Where the amount to which the plaintiff would be entitled on the evidence exceeds that specified in the plaint, plaintiff is restricted to the amount so specified, *Nathooram* vs. *Jardine, Skinner & Co.*, 1 Coryton, 118; see also 2 Moore, 113.

Rejected.—A Judge in considering whether he should admit or reject a plaint should not refer to documents or facts not stated in or annexed to it, nor interrogate the plaintiff; but should confine himself to the plaint itself—*Girdharlal Dayal Das* vs. *Jagannath*, 10 Bom., 182.

A plaint should not be rejected because a wrong date is given for the cause of action, provided the action is not barred; it should be amended—*Sheoraj Singh* vs. *Nur Khan*, 7 Alla., 354; nor for improper valuation without giving plaintiff time to ply the deficiency—*Thakoor Pattuck* vs. *Ram Soomrum Lall*, 1 Alla., 16; nor if presented to the wrong Court; it should be returned—*Khandu Murshvar* vs. *Sheoji*, 5 Bom., 212, nor in a suit for a kaboolyat and the date of the commencement of the kaboolyat is not given—*Gholam Mohamed* vs. *Asmut Ali*, B. S. N. (2 B.), 974, it should be returned for amendment; nor if strictly accurate language has not been used—*Inglis* vs. *Ram Singh*, W. R., F. B., 159; nor if it is prolix or contains irrelevant matter—*Bishen Sahaye Singh*, vs. *Beer Kishore Singh*, 8 W. R., 296; nor because costs in respect of a former suit have not been paid—*Luckeymonee Dossee* vs. *Khetter Coomary Dossee*, 2 Ind. Jur., N.S., 117; nor because the document on which plaintiff sues has not been filed with it—*Roy Chand Ami Chand*, 2 Bom., 369; but it may be rejected if it is intentionally obscure—*Mahomed Hossein* vs. *Potun*, 20 W. R., 147; or if it joins causes of action against several defendants which have accrued separately *Ram Tewary* vs. *Luchman Pershad*, 8 W. R., 15; 1. B. L. R. (F. B.), 731; *Imrit Nath Jha* vs. *Dhunput Singh*, 18 W. R., 288; *Mussamut Rutta Bebee* vs. *Dumree Lall*, 2 Alla., 153; or contains a prayer to prosecute the defendant for forgery—*Bishen Suhaye Singh* vs. *Beer Kishore Singh*, 8 W. R., 296; or if it consists only of two counts and the first does not shew the subject of the claim without reference to a schedule, and the second does not shew a right in the plaintiff—*Luckeymonee Dossee* vs. *Khetter Coomary Dossee*, 2 Ind. Jur., N.S., 117; or if it asks for a money decree against a mortgagor, and the mortgaged property is only liable—*Uma Sundari Dasi* vs. *Umachurn*, 6 B. L. R., at p. 117; and if a person is added as a nominal defendant against whom no relief is claimed to give a certain Court jurisdiction, the Court should reject the plaint or call on the plaintiff to amend by striking out the name of the defendant, and then return it for presentation in the Lowest Court competent to try it—*Sridhar Hori* vs. *Chima*, 10 Bom., 17. Where the subject-matter alleged raises a fair question for trial, the plaint should not be rejected on the ground that plaintiff is not likely to succeed—*Lakhsmi Ammal* vs. *Tikaram Tovaji*, 1 Mad., 240. And where a plaint in a suit to establish a right to land and recover rent was filed in 1866 and did not allege any specific acts of ownership after 1845, but contained a statement general enough to let in evidence, it was held that the plaint should not have been rejected—*Udaya Varma* vs. *Nayan Chambathu*, 1 Mad., 322; but see *Chetti Gaundan* vs. *Sundaram Pillai*, 2 Mad., 52; and *Pershad Sein* vs. *Rajendro Kishore Singh*, 12 Moore, 275; 12 W. R., 18; in which their Lordships of the Privy Council seemed to hold that a Court under section 32, Act VIII of 1859, would be justified in compelling the plaintiff to satisfy it that his right of action was not barred, and in *Salugi Kesragi* vs. *Kajasangi Salam Sanji*, 2 Bom., 162 (approved of in *Belava Basangonda* vs. *Shidgonda Kadapa*, 7 Bom., 101), Couch, C. J., said :—" Section 32 directs that if on the face of the plaint.....it shall appear to the Court that the subject-matter of the suit does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. The words are imperative and appear to impose on the Court, before defendant is called upon to state his defence, the duty of taking any objection that may exist in point of law to the plaintiff's claim. The words of cl. (c) section 54 are also imperative, and the Courts are bound to dismiss a suit on the ground of limitation at any stage. Where a plaint discloses no cause of action, a Court is justified in examining the pleaders on both sides, and from their examination eliciting and fixing the real issue and determining the case on the trial of such issue—*Man Gobind Sirdar* vs. *Umbika Monee Dossia*, 16 W. R., 218.

In a suit for contribution, which was decreed by the first Court but dismissed by the lower Appellate Court on the ground that the plaint did not specify the amount each defendant was liable to contribute; *held*, that the Judge should have tried to ascertain that from the evidence before dismissing the suit—*Bhoue Bibee* vs. *Pallan Gazee*, 11 W. R., 131.

At or before the first hearing.—These words are merely directory, not mandatory, and a plaint may be amended after the first hearing provided the origi-

nal character of the suit is not altered—*Modhe* vs. *J. Dongre*, I. L. R., 5 Bom., 609; *Cutts* vs. *Brown*, I. L. R., 6 Cal., at p. 332; in regular appeal—*Kedar Nath Dass* vs. *Protab Chunder Dass*, I. L. R., 6 Cal., 626; or even in the most advanced stage before their Lordships of the Privy Council—*Mohammed Zahoor Ali Khan* vs. *Thakooranee Kutakor*, 11 Moore, at p. 487; see however *Farzund Ali* vs. *Jusuf Ali*, I. L. R., 2 Alla., 669; *Radr-un-nessa* vs. *Muhammed Jan*, I. L. R., 2 Alla., at p. 675; and *Mothoora Mohun Roy* vs. *Shaw*, 2 C. L. R., 409.

A plaint may be rejected after it has been registered. This is clear from the present section. See *Chetti Gaundan* vs. *Sundaram Pillai*, 2 Mad., 51. See, however, *Hubibul Hosscin* vs. *Mahomad Reza*, I. L. R., 8 Cal., 19; *Valiya Kesava* vs. *Suppannair*, I. L. R., 2 Mad., 308.

Appeal.—Under this Code an order rejecting a plaint is treated as a decree. See section 2, *ante*; orders returning plaints for amendment or presentation in the proper Court are not decrees, but are appealable under section 588, post; see note on section 5 *b*, post; an order under this section returning a petition is not a decree, and cannot be appealable twice—*Joynath Roy* vs. *Lall Bahadoor Singh*, 10 C. L. R., 146; and where the first Court directed a plaint to be returned and the Appeal Court decreed the appeal and subsequently made an additional order directing that the case "should be returned for re-trial," it was held this was not a decree and no second appeal would lie—*Kisha Ram* vs. *Nar Singh*, 3 L. R., 3 Alla., 855.

Review.—A Court of Small Causes is not competent to set aside an order rejecting a plaint—*Jitmal Valad Bahiravdas* vs. *Ramchandra Valad Jagrup*, 5 Bom., 97. Note in case—*Karup* vs. *Singh*, I. L. R., 5 Cal., 699.

Refund of Stamp.—Where a plaint disclosing a reasonable cause of action is rejected not for any substantial defect but an error in form, and the plaintiff is free to prosecute precisely the same case in another form against the same defendant, the value of the stamp affixed to the plaint shall on application be refunded by the Collector of the district in which the Court is situated, together with a certificate from the Judge who rejected the plaint, declaring that it was rejected under the circumstances above described, and that the value of the stamp should, in his opinion, be refunded—Fin. Not. 2748, 1875. Where a suit is filed in a Munsiff's Court beyond his powers to try, the plaintiff should not lose the stamp, but the plaint should be returned—*Mussamut Edoo* vs. *Hefazut Hossein*, 13 W. R., 358; and see cases at 11 W. R., 542; 8 W. R., 47.

Time fixed by Court.—Plaintiff presented his plaint improperly stamped on the 20th of September, and it was returned to him to make the deficiency good without any time being specified within which the order should be carried out. The deficiency, was supplied and the plaint accepted on the 4th of November, although limitation had expired on the 5th of October *Mussamut Begu Begum* vs. *Syud Yusuf Ali*, 6 Alla., 139; see also *Ismail Saheb* vs. *Chetti*, 1 Mad., 427. Where a plaint is returned for amendment, the order should specify a certain time within which such amendment should be made—*Sheo Pertab* vs. *Sheo Gholam*, I. L. R., 2 Alla., 875, *Ismail Sahib* vs. *Arumuga Chetti*, 1 Mad., 427; and the date of first presentation and not the date of carrying out the order is the date up to which limitation should be counted—*Hidayut Ali* vs. *Mairaj Begum*, 3 Alla., 202; *Khem Kharan* vs. *Hur Dayal*, I. L. R., 4 Alla., 37; *Ram Lall* vs. *Harrison*, I. L. R., 2 Alla., 832.

Plaintiff sued a purchaser to enforce a right of pre-emption, and then discovering that he was a minor, obtained an order to appoint a guardian for the suit and amend his plaint. *Held*, the suit was legally constituted against him on the date of first presentation—*Khem Karak* vs. *Hai Dyal*, I. L. R., 4 Alla., 37.

Changing the character of the Suit.—The Courts of this country are to decide according to equity and good conscience, and the substance and merits of the case are to be kept in view: the substance and not the mere literal wording of the issues is to be regarded; and if, from inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be by adjournment, for the decision of the real points in dispute—*Hunooman Persaud Panday* vs. *Mussamut Babooee Munraj*, 6 Moore, 410; but the amendment must be either involved in the pleadings, or consistent with the case as originally laid, and the state of facts and the equities and ground of relief originally alleged and pleaded should not be departed from—*Eshan Chunder Singh* vs. *Shama Churn Bhutto*, 11 Moore, 7; *Mukhoda Soondury Dasi* vs. *Ram Churn Kurmokar*, I. L. R., 8 Cal., 871, and, acting on this principle, the Courts of this country have allowed the plaint and issues to be amended in special appeal—*Ram Doyal Khan* vs. *Ojoodhia Ram Khan*, 25 W. R., 425; and where, on the face of the plaint, no relevant case was made against certain defendants, as where the suit

was on a *money* bond executed by A, and against A and B for combining to get A's estates illegally transferred, their Lordships of the Privy Council allowed the plaintiff to amend his plaint, so as to make the suit one for recovery of money due on the bond—*Mohummud Zahoor Ali Khan* vs. *Mussamut Thakooranee Rutta Koer*, 11 Moore, 468. Under the present Code it is doubtful whether an amendment must not take place at or before the first hearing. However, any mistake may be met by amending the issues, and this is the proper mode of procedure—*East Indian Railway Company* vs. *Jordan*, 14 W. R., 11. See also the cases mentioned under *At or before first hearing, ante*, p. 85.

The general rule is, that a party must be limited to the case which he puts forward in his plaint; he may indeed, from the commencement of the suit, put forward in his plaint an alternative case, and the defendant will have notice that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case, he may have leave to amend his plaint and to state his case therein correctly, if the Court think that he has rested his claim upon wrong grounds from misinformation; ignorance of law or fact, mistake or misconstruction of documents. The Court will then make such an order as may to it seem just regarding the adjournment of the hearing and costs; but, as a general rule, a plaintiff must abide by his plaint, and he cannot after the parties have come to trial abandon his own story and adopting that of the defendant ask relief on that policy—*Shib Kristo Sircar* vs. *Abdool Hakeem*, I. L. R., 5 Cal., 602; specially if in the plaint he speaks of his own personal knowledge—*Provabatty Dossee* vs. *Bose*, I. L. R., 7 Cal., p. 455. So where a specific title is alleged but not proved, the plaintiff in order to succeed on 12 years' adverse possession must raise it so clearly in the first Court, that his adversary knew he intended to rely on it—*Krishna Churn Baisack* vs. *Surma*, I. L. R., 7 Cal., 540; but this rule must not be construed very strictly, for in a case in which a plaintiff claimed an easement by prescription, their Lordships of the Privy Council dealing with the case as a special appeal—decreed the claim on the presumption of title arising from grant—*Rajrup Koer* vs. *Abdul Hossein*, I. L. R., 6 Cal., 394; see also *London and County Co.* vs. *Ratcliffe*, 6 App. Cas., at p. 726; and this has been followed in other ases by the High Court—*Puna Kuvarji* vs. *Bai Kuvar*, I. L. R., 6 Bom., 20; *Koylash Chunder Ghose* vs. *Sonaton*, I. L. R., 7 Cal., 132; and if a plaintiff claims possession generally under some alleged title, such as deed, or debuttur, and also sets out 12 years' possession he is entitled to succeed—*Gossain Dass Chunder* vs. *Issur Chunder Nauth*, I. L. R., 3 Cal., 225; *Goluch Chunder Masonta* vs. *Nundo Coomar Roy*, I. L. R., 4 Cal., 699; see also "*changing the nature of suit*" under section 584, post. The adoption by the Courts of a general principle other than this would encourage perjury and forgery—*Lakshmibai* vs. *Haribin Raoji*, 9 Bom., 1; *Narainee Dossee* vs. *Nurrohurry Mohunto*, Marsh., 70; *Viraswami Gramini* vs. *Ayyasvami Gramini*, 1 Mad., 471; *Bhaggo Mutty Bibee* vs. *Mahomed Wazil*, 25 W. R., 315; see, however, *Ram Lochun Chuckerbutty* vs. *Rani Soonder Chuckerbutty*, 20 W. R., 104.

Changing the nature of the suit does not mean that the plaintiff cannot succeed unless he prove the allegations in his plaint—*Lakshman Bhisaji* vs. *Hari Dinkar*, I. L. R., 4 Bom., 584.

Amendments should not be allowed save when the plaintiff has an honest case and, by some mistake or misapprehension, has failed to put things properly before the Court—*Bhyro Dutt* vs. *Lekhranee Kooer*, 16 W. R., 123; nor if they will affect the rights of third parties—*Rughoonundun Singh* vs. *Gopal Chund Chowdhry*, 20 W. R., 17; nor so as to allow totally new causes of action to be added—*Bailoo Mull* vs. *Nanuk*, 1 Alla., 171; and when the plaint in a suit for damages on account of malicious prosecution was filed on the last day but one and was rejected as defective, it was held, amendment was properly refused—*Girdharlal Doyaldas* vs. *Jagannath*, 10 Bom., 182.

Amendment is a matter within the discretion of the Court, and its refusal is no ground for special appeal—*Watson & Co.* vs. *Nidhoo Digwar*, 10 W. R., 87.

Application for amendment by substitution of parties should be supported by an affidavit shewing on what grounds the application is made—*Delhi and London Bank* vs. *Miller*, 7 B. L. R., App., 65; a petition is also usual, but not necessary—*Gobind Chandra Dutt* vs. *Ganga Dhye*, 7 B. L. R., 333.

Amendment disallowed.—A claim for rent on contract cannot be changed into one for use and occupation of the land—*Luchmeput Doss* vs. *Shaikh Enaet Ali*, 22 W. R., 317; *Lukhee Kant Doss* vs. *Sumeerooddi Tustar*, 21 W. R., 208; for hire of cargo boats, to suit for accounts as agent—*Shib Kristo Sircar* vs. *Abdool Hakeem*, I. L. R., 5 Cal., 602; nor a claim to land as devisee under a will to a claim as heir, nor from a widow entitled to *den mohur* to a widow as heir—*Umbicka Churn Dutt* vs. *Nadir Hossein*, 11 W. R., 133; nor a claim as adopted son to a claim as heir—*Gopee Lall* vs. *Chundrabolee Bulooiee*,

19 W. R., 12 (P. C.); nor a claim to set aside an alienation on the ground of illegitimacy to a claim that it was made without the consent of the other heirs—*Sree Pershad* vs. *Gooroo Trumbuck Nath Deo*, 14 W. R., 386; or, that it had been made to pay immoral debts, and that a father could not do so under mitakshara law—*Narain Singh* vs. *Bhugwan Dutt*, 11 W. R., 10; *Jankee* vs. *Jhanjoo*, 2 Alla., 407. So a suit for a pottah on a special contract against 12-anna sharers of an estate on the ground that they had taken a kaboolyat cannot be changed into one based on the grounds that plaintiffs, being occupancy ryots had a right to a pottah at a fair rent—*Uthur Hossein* vs. *Ramphal Roy*, 20 W. R., 75; nor can a claim to land as *mirasdar* be turned into one as an occupancy ryot (not in the alternative)—*Soorja Koomar* vs. *Gungadhur Roy*, 12 W. R., 80, overruling the previous cases at 10 W. R., 361; 8 W. R., 374; nor as heir of A to heir of B—*Ishan Chunder Chowdhry* vs. *Sharoda Goopteah*, 12 W. R., 487; see also *Durga Narain Bose* vs. *Brajo Kishore Ghose*, 23 W. R., 172. But as to the effect of setting up a specific title, see, for an opposite opinion—*Koylash Kaminee Dossia* vs. *Judoo Bashinee Dossia*, 22 W. R., 390. The doctrine, that a party must prove the particular title he sets up, must not be confounded with the means of proving it. Thus, if a person claim to hold under a grant, such grant being evidenced by a sunnud, and fails to prove the sunnud, he may prove the grant by other means—*Rash Beharee Lal* vs. *Nobaye Poddar*, 11 W. R., 465. A suit for possession and mesne profits cannot be changed into one for resumption—*Gobind Mahaputtro* vs. *Madhub Pershad*, 6 W. R., 211; *Gobind Mahaputtro* vs. *Gopenath Pundit*, Ben., F. B. R., 581; nor can a claim to demolish a building on one's own property be converted into a claim for demolition on joint property without the co-owner's consent—*Nobin Chunder Mitter* vs. *Mohesh Chunder Mitter*, 12 W. R., 69; nor a claim to khas possession to one for symbolical possession in whole or in part—*Nila Bebee* vs. *Sonai Bebee*, 21 W. R., 422; *Kishen Chunder Sandyal* vs. *Kaleenath Gangooly*, 18 W. R., 507. But as opposed to this, see *Fukeer Dass Puroheet* vs. *Gopal Mookerjee*, 12 W. R., 107. And generally though a person in a suit based on dispossession need not state his title (*id*); yet if he does, he ought not to succeed on a perfectly different one—*Huro Soonduree Debia* vs. *Unno Poorna Dabia*, 11 W. R., 550. As where a man claims land as his own and afterwards claims an easement over it—*Lalji Rotunji* vs. *Gunga Ram Talja Ram*, 2 Bom., 176; or claims as pre-emptor based on vicinage and separate ownership, and afterwards claim pre-emption and joint owner, or *vice versâ*—*Mohadeo Singh* vs. *Mussamut Zeenunoonissa*, 11 W. R., 169; *Gobind Row* vs. *Girdharee Sahoo*, 24 W. R., 325; nor can a claim to set aside a zur-i-peshgi be changed into one for a declaratory decree—*Mussamut Daolhun Jankee Kooer* vs. *Lall Beharee Roy*, 19 W. R., 32; nor a claim as whole owner by purchase from A, to one as heir or joint purchaser with him—*Doss Ram Doss* vs. *Mohendra Roy Decha*, 18 W. R., 274; and in a suit for possession based on a kobala the Privy Council refused to make the defendant repay advances, though the real transaction was a mortgage—*Rajah Sahib Pershad Sein* vs. *Baboo Budhoo Singh*, 12 Moore, 275; and where A sued as a mortgagee, asserting that she had advanced the money out of her own moneys, their Lordships declined to hear it urged that the money came from her reputed husband, and that the transaction was by way of gift or provision for her—*Bhowan Doss* vs. *Sheikh Mahomed Hossein*, 13 Moore, 352. Plaintiffs, stating that R, their husband, has been appointed shebait, but that they were doing the duties, sued for a declaration that certain property, mortgaged by their husband and sold by the mortgagee, belonged to the idol; they did not make their husband a party. *Held*, the plaint could not be so varied as to make him a party—*Biddia Soonduree Dassee* vs. *Doorganund Chutteriee*, 22 W. R., 97; and where plaintiff, instead of suing a corporate body in its own name, sued it through its agent; the corporation could not added—*Nobin Chunder Paul* vs. *Stephenson*, 15 W. R., 534, and so where a plaintiff sued the Secretary of State and failed, it was held that his suit should have been dismissed and not amended by introducing another party—*Seth Dhunraj* vs. *Hankin*, 1 Alla., 204. See, however, cases under Amendments allowed, post.

Amendments allowed.—In an action on promissory notes brought under Act V, 1866, defendants got leave to appear and defend, and the suit was dismissed on the ground that part of the consideration for the notes was illegal; the plaint was amended so as to recover so much of the consideration as was not illegal—*Joseph* vs. *Solano*, 18 W. R., 424; a suit for khas possession of a ⅓rd share was allowed to be changed into one for joint possession—*Raj Kishore Bhuddur* vs. *Huree Mohun Bhuddur*, 19 W. R., 195 (disapproving of *Bejoynath Chatterjee* vs. *Luckhee Monee Debia*, 12 W. R., 248; but see *Nila Bibee* vs. *Sonai Bibee*, 21 W. R., 422 above); a claim of rent in kind to rent in money—*Mussamut Bebee Jan* vs. *Bhugul Singh*, 21 W. R., 438; and where A and B sued, and it appeared A alone was entitled, the name of B was ordered to be struck out and the suit proceeded—*Sree Ram Hazra* vs. *Gyaram Hatee*, 11 W. R., 537;

but in another case the whole suit was dismissed—*Sheo Nundun Pershad* vs. *Mukdoom Buksh*, 20 W. R., 364. A suit for confirmation of possession was changed into one for recovery of possesssion—*Moulvie Abdoolah* vs. *Shah Mujeesooddeen*, 16 W. R., 27; *Rash Dhave Singh* vs. *Nuthoonee Singh*, 24 W. R., 301; *Kashee Nath Mookerjee* vs. *Mohesh Chunder Goopto*, 25 W. R., 168; not so, in *Moulvie Abdoolah* vs. *Shah Mujeesoodeen*, 15 W. R., 286, and *Sansar Roy* vs. *Indrasun Roy*, 25 W. R., 6; *Terirput Singh* vs. *Sudersan Das*, I. L. R., 4 Cal., 46. In a suit for confirmation of possession and to set aside deeds, although the confirmation was refused the deeds were set aside—*Tacoordeen Tewary* vs. *Ali Hosein Khan*, L. R., 1 Ind. App., 192; and a plaintiff who has been dispossessed after filing a suit for confirmation of possession may add a prayer for possession—*Bishop Mellus* vs. *The Vicar of Malabar*, I. L. R., 2 Mad., 295. As a rule, in a claim for confirmation of possession under a certain title, the title cannot be changed; otherwise when the claim is for possession—*Man Govind Sircar* vs. *Umbika Monee Dossia*, 16 W. R., 218, *Gossain Dass Chunder* vs. *Issur Chunder Nath*, I. L. R., 4 Cal., 699; and the plaintiff is bound to prove the title set up affirmatively—*Sheik Torab Ali* vs. *Mahomed Tukee*, 19 W. R., 1; and his possession—*Tacoordeen Tewary* vs. *Ali Hossein Khan*, L. R., 1 Ind. App., 192; *Terirput Singh* vs. *Sudersan Dass*, I. L. R., 4 Cal., 46; but 12 years' adverse possession is sufficient for a declaration to hold rent free—*Abhoy Churn Pal* vs. *Kally Pershad Chatterjee*, I. L. R., 5 Cal., 949.

Amendment should be allowed where the defendant is wrongly described—*Maharaja of Viziangram* vs. *Challagh*, 12 B. L. R., 443; or parties are changed—*Kedarnath Dass* vs. *Protab Chunder Dass*, I. L. R., 6 Cal., 626; *Delhi and London Bank* vs. *Miller*, 7 B. L. R., 65; *Shridhar Hari* vs. *Chema*, 10 Bom., 17.

A suit under Act VIII (B. C.), 1869, may be changed into an ordinary civil suit—*Gobind Chunder Bose* vs. *Bykuntonath Ghose*, 19 W. R., 61.

When the plaint shall be rejected.

54. The plaint shall be rejected in the following cases:

(*a*) if the relief sought is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(*b*) if the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

(*c*) if the suit appears from the statement in the plaint to be barred by any positive rule of law:

(*d*) if the plaint, having been returned for amendment within a time fixed by the Court, is not amended within such time.

This section applies to M. S. C. C., and, with exception of clauses (*a*) and (*b*), to H. C.

A Judge cannot, it is said, reject a plaint after it is registered—*Hubibul Hossein* vs. *Mahomed Reza*, I. L. R., 8 Cal., 19; *Valia Kesava* vs. *Suppannair*, I. L. R., 2 Mad., 308; or in a case transferred to his own Court from that of the Principal Sudder Ameen without giving notice to the defendant—*Jowalla Nath* vs. *Collector of Meerut*, S. D., N. W., 1861, 325. See, however, note under section 53, *ante*.

Appeal.—An appeal lies from orders passed under this section—*Ajoodhya Pershad* vs. *Gunga Pershad*, I. L. R., 6 Cal., 2491; but see *Habibul Hossein* vs. *Mahomed Reza*, I. L. R., 8 Cal., 192; section 588 post; section 2, "decree," *ante*; see note on section 53.

The procedure of this section has been followed in appeals, and where an appeal unduly stamped was filed, it was held that the Judge should not have dismissed the suit at once, but should have allowed the appellant an opportunity of filing the proper stamp—*Nussurut Ali Chowdhry* vs. *Mahomed Kanoo Sikdar*, 11 W. R., 541. Rejection, not dismissal of the suit, is the proper order to pass. In a suit in a Munsif's Court, it was found after issues were fixed and some evidence recorded, that the claim had been undervalued, and that if properly valued it would be beyond jurisdiction; it was held that the proper order was to reject the plaint and return it, so that the plaintiff might add the additional stamps required and sue in the proper Court—*Ram Gutty* vs. *Goonomonee Dabia*, 11 W. R., 177, disapproving of—*Shaikh Muzhur Ali* vs. *Mussamut Basoo*, 8 W. R., 47.

(*a*) An error in valuation not affecting jurisdiction is not one on which to base an appeal—*Naasa bin Biba* vs. *Baba bin Bahorse*, 1 Bom., 63; and should not be listened to unless raised in the first Court—*Kala Chand Sein* vs. *Anund Kristo Bose*, 22 W. R., 43. A respondent can raise the question of valuation—*Takoor Pathuk* vs. *Ram Soomrun Lal*, 2 Alla., 433; and where it affects the jurisdiction of the first Court, the Appellate Court may raise it—*Sheo Gobind Rawut* vs. *Abhai Narayan Singh*, 5 B. L. R., App., 17, and dismiss the suit—*Mawa Lall* vs. *Beharee Lall*, 14 W. R., 195; *Muzhur Ali* vs. *Mussamut Bass*, 8 W. R., 47; though it need not dismiss, but reject the plaint—*Mussamut Edoo* vs. *Hefajzut Hossein*, 13 W. R., 358.

As to the difference between this clause and section 10 of the Court Fees Act, see the case of—*Valija Kesava Vadhar* vs. *Suppannair*, I. L. R., 2 Mad., 308.

Valuation under Act VII, 1870, only refers to fees, and not jurisdiction—*Jeebra Singh* vs. *Inderjeet Mahton*, 18 W. R., 109; *Nauhoon Singh* vs. *Toofanee Singh*, 20 W. R., 33; and is not conclusive as to the latter—*Mohun Lall Sookul* vs. *Bebee Dass*, 7 Moore, 428.

Where excess stamps have been filed in consequence of an over-valuation they should be returned—In the matter of *C. H. Grant*, 14 W. R., 47; the onus of shewing over-value lies on the defendant if he asserts it—*Oma Sunkar Chowdhry* vs. *Syud Munsoor Ali Khan*, 13 W. R., 326.

(*b*) See "*Time fixed by Court*" at p. 86, *ante*.

(*c*) The plaintiff is bound to satisfy the Court that the claim is not barred—*Raja Pershad Sein* vs. *Rajender Kishore Sing*, 12 Moore, at p. 337; *Dawkins* vs. *Penrhyn*, 6 Ch. D., 318, 4 App. Cas. 51; and see note under section 53, *ante*.

Procedure on rejecting a plaint.

55. When a plaint is rejected, the Judge shall record with his own hand an order to that effect with the reason for such order.

This section applies to H. C. and M. S. C. C.

An officer of the Court cannot reject a plaint; it must be done by the Court.

When rejection of plaint does not preclude presentation of fresh plaint.

56. The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

This section applies to H. C. and M. S. C. C.

Kadumbinee Dassee vs. *Unnopoorana Dassee*, 14 W. R., 289.

When the plaint shall be returned to be presented to the proper Court.

57. The plaint shall be returned to be presented to the proper Court in the following cases:—

(*a*) if a suit has been instituted in a Court whose grade is lower or higher than that of the Court competent to try it, where such Court exists, or where no option as to the selection of the Court is allowed by law:

(*b*) if, in a suit relating to immoveable property, but not coming under the proviso to section 16, it appears that no part of such property is situate within the local limits of the jurisdiction of the Court to which the plaint is presented:

(*c*) if, in any other case, it appears that the cause of action did not arise, and that none of the defendants are

dwelling or carrying on business, or personally working for gain, within such local limits.

Procedure on returning plaint.

On returning a plaint, the Judge shall, with his own hand, endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reason for returning it.

This section applies to M. S. C. C.

The practice under these sections has not been uniform. In *Muzhur Ali* vs. *Mussamut Basoo*, 8 W. R., 47, the Lower Appellate Court reversed a Munsif's decree dismissing the suit after hearing, on the ground that he should have given a longer time to put in an additional stamp. In Special Appeal the High Court, Macpherson and Seton-Karr, JJ., held: "We think that the order of the Lower Appellate Court is wrong, and that the decree of the Munsif was right. The question as to the valuation did not arise upon the face of the plaint. It, therefore, was not raised at the time of filing the plaint, nor until the first hearing, which came on in due course upon the return of the summons. Consequently the provisions of sections 30, 31, 32 of Act VIII of 1859, all of which are sections relating to the first presenting and filing of the plaint, do not apply to the present case at all. And the Munsif, finding at the hearing that he had no jurisdiction on account of the real value of the claim, ought, in strictness, as it seems to us, to have at once dismissed the suit on the ground of jurisdiction. But the Munsif, not in the first instance adopting this course, followed the directions, or rather the spirit of section 31 of Act VIII of 1859, and gave the plaintiff an opportunity of correcting her error. Of this opportunity the plaintiff did not avail herself, and the Munsif then dismissed the suit. Under these circumstances we are at a loss to conceive what other decree the Munsif could have made." In *Laluji Kesuji* vs. *Raj Sangh Jalamsangji*, 2 Bom., 162, Couch, C.J., considered that section 32, Act VIII of 1859, applied only to a cause "before the defendant is called on to state his defence." But it has been held that the plaint should be returned and the suit not dismissed after evidence in the first Court—*Ram Gutty* vs. *Goonomonee Dabia*, 11 W. R., 177; *Kartick Nath Panday* vs. *Roy Nundeput Mahatab*, 23 W. R., 263; *Abdul Samed* vs. *Rajendro Kishore Singh*, I. L. R., 2 Alla., 357; nor after trial in the first Appellate Court or even the High Court itself—*Edoo* vs. *Hefazut Hossein*, 13 W. R., 358; *Prosad Dass Mullick* vs. *Russick Lall*, I. L. R., 7 Cal., 157. The position of the section favours the first construction, and doubtless it is correct; the second interpretation allows a person to have the opinion of several Courts on his case for nothing, and then to renew his litigation, having learned in what points his strength and weakness consist. It has been held that a plaint should be rejected and not returned, if it does not disclose cause of action—*Najar Mal* vs. *Macpherson*, I. L. R., 3 Alla., 766: but an Appellate Court cannot reverse a decree solely on this ground without being satisfied that no such cause of action was established by the evidence—*Shah Ahmed* vs. *Taree Rai*, I. L. R., 7 Cal., 343.

Procedure on admitting plaint.

58. The plaintiff shall endorse on the plaint, or annex thereto, a memorandum of the documents (if any) which he has produced along with it; and, if the plaint be admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court, by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief or remedy required, in the suit, in which case he shall present such statements.

Concise statements.

If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall shew in what capacity the plaintiff or defendant sues or is sued.

The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

The chief ministerial officer of the Court shall sign such memorandum and copies or statements if, on examination, he finds them to be correct.

Register of suits.

The Court shall also cause the particulars mentioned in section 50 to be entered in a book to be kept for the purpose and called the Register of Civil Suits. Such entries shall be numbered in every year according to the order in which the plaint is admitted.

Judicature Acts, Order 2, Rule 1. This section applies to H. C. and M. S. C. C.

A plaintiff should enter in his plaint and concise statement a claim for an injunction and receiver where the obtaining either is a substantial portion of the action—*Colebourne* vs. *Colebourne*, 1 Ch. D., 690.

For form of concise statements, see schedule IV, *infra*.

Production of document on which plaintiff sues.

Delivery of document or copy.

59. If a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

List of other documents.

If he rely on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

This section applies to H. C. and M. S. C. C.

The Courts have not agreed as to the construction of the corresponding section of Act VIII of 1859. In *Promsook Chunder* vs. *Rajkisto Mitter*, Hyde, 145, Wells, J., held that it prevented a plaintiff from using any document which he did not produce "or enter in the list" at the time the plaint was filed; but in *S. M. Kameenee Dossee* vs. *S. M. Hurromoney Dossee*, Coryton, 151, Phear J., held that the section only applied to such documents as are in their nature the essence of the case, and on which the plaint is founded. The former construction appears more reasonable, and has had the support of the Court on its appellate side. In the case of *Ranee Roshun Jehan* vs. *Syed Inayut Hossein*, Marsh., 127, Peacock, C.J., said: "By section 39, Act VIII, 1859, a plaintiff must file with his plaint *all* documents upon which he relies as evidence in support of his claim; and that no document not presented with the plaint, can be received at a later stage of the case without the sanction of the Court. The Judge is not accountable for the number of the documents produced by a plaintiff in support of his claim. All documents put on by the parties *must be received*; but under section 129 of the Code the Court is competent to reject such documents and rid the record of their presence." See note on section.

Pottahs—*Ataoolla Mundle* vs. *Saheeooddeen Tarafdar*, W. R., 1864, p. 271, and title deeds sued on are within the section—*Lekhraj Roy* vs. *Mutty Madhub Sen*, 14 W. R., 95.

Statement in case of documents not in his possession or power.

60. In the case of any such document not in his possession or power, he shall, if possible, state in whose possession or power it is.

This section applies to H. C. and M. S. C. C.

Suits on lost negotiable instruments.

61. In case of any suit founded upon a negotiable instrument, if it be proved that the instrument is lost, and if an indem-

nity be given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

This section applies to H. C. and M. S. C. C.

A suit will lie on the ground that the indorser refused to give a new cheque, for one lost, and to refund the money paid for it. The drawer should be made a party—*Baldeo Prosad* vs. *Grish Chunder Bose*, I. L. R., 2 Alla., 754.

Production of shop-book.

62. If the document on which the plaintiff sues be an entry in a shop-book or other book in his possession or power, the plaintiff shall produce the book at the time of filing the plaint, together with a copy of the entry on which he relies.

Original entry to be marked and returned.

The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original and attesting the copy if found correct, shall return the book to the plaintiff and cause the copy to be filed.

This section applies to H. C. and M. S. C. C.

This section does not require the Court to inspect the document, but only that the Judge or officer should mark it for identification—*Atmaram Gulabrai* vs. *Amir Chand Rup Chand*, 3 Bom., 92.

Suit on a lost cheque—*Boldeo Prasad* vs. *Grish Chunder Bose*, I. L. R., 2 Alla., 754.

Inadmissibility of document not produced when plaint filed.

63. A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

Nothing in this section applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant, or handed to a witness merely to refresh his memory.

This section applies to H. C. and M. S. C. C..

Under section 39, Act VIII of 1859, the Court had no power to allow a plaintiff to file his documents at the settlement of the issues or the first hearing and not with his plaint—*Campbell* vs. *Keith*, 1 Hyde, 287.

The words of the law are imperative—*Ritchie, Stuart & Co.* vs. *Gladstone, Wyllie & Co.*, 1 Ind. Jur., O. S., 125; and prohibit a plaintiff from using any document which he did not produce or enter in the list when the plaint was filed—*Promsook Chunder* vs. *Rajkisto Mitter*, 1 Hyde, 145, unless the Court exercises the discretion given to it under this section—*Lopez* vs. *Driberg*, W. R., 1864, Act X, 67.

But the omission to produce a document when instituting a suit is no ground for rejecting the plaint—Ex-parte *Rayachand Amichand*, 2 Bom., 369.

Where khusrah papers, which formed the very essence of the action, were not filed or produced with the plaint within the prescribed time, the Court of First Instance was held to have been justified in rejecting them when subsequently tendered as evidence—*Amar Chand Lohata* vs. *Ram Rutun Roy*, 18 W. R., 515. Merely giving a document to a witness to refresh his memory is not receiving it in evidence—*Ramji Mudaiji* vs. *Ran Gayya Chatti*, 1 Mad., 168.

In the case at 1 Hyde, 145, referred to above, Wells, J., held that the section covered every document used in evidence, but in the case of *S. M. Kameenee Dossee* vs. *S. M. Hurromoney Dossee*, Coryton, 151, it was decided that the prohibition only extended to promissory notes and bills of exchange, which are in their nature the essence of the action, and on which the plaint is founded. In that case, which was to recover certain jewels, the defendant objected to the admission of a list of the jewels on the ground that it should have been filed with the plaint; the objection was overruled.

It is sufficient for the admission of a document under this section that the plaintiff was in ignorance of its existence when the plaint was filed—*Ritchie Stuart & Co.* vs. *Gladstone Wyllie & Co.*, 1 Ind. Jur., O. S., 125; or that the Court is satisfied of its *bonâ fide* nature and reliableness—*Attaoollah Mundle* vs. *Saheeooddeen Tarafdar*, W. R., 1864, p. 271.

The admission of documentary evidence, not brought in as directed in section 59, is not a ground of appeal against the ultimate determination of the suit by the Court which has admitted it—*Goshain Tota Ram* vs. *Raja Bickrumjee Bullub*, 13 Moore, 83.

Leave of the Court.—In section 39, Act VIII, 1859, the words were "Sanction of the Court," and where documents were referred to an Ameen to inspect, and ultimately acted upon by the Court, this was held to be abundant proof of sanction—*Goshain Tota Ram* vs. *Raja Bickrumjee Bullub*, 13 Moore, 83.

The reception of evidence afterwards with leave of the Court is not a ground of appeal—*Goshain Tota Ram* vs. *Rukinibalar*, 3 B. L. R. (P. C.), 34, 13 Moore 83; it does not affect the merits of the case—*Ram Chunder Dutt* vs. *Chunder Coomar*, 13 Moore at p. 198; see notes on sections 138—145, post.

CHAPTER VI.

OF THE ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

Summons.

64. When the plaint has been registered, and the copies or concise statements required by section 58 have been filed, a summons may be issued to each defendant to appear and answer the claim on a day to be therein specified,

(*a*) in person, or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some other person able to answer all such questions.

Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court:

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

This section applies to H. C. and M. S. C. C.

Summonses to defendants must issue under the signature of the Judge or such officer as he appoints, and the seal of the Court, 1 C. O. (N. W.), 1871.

If the defendant died before the filing of the plaint, the case cannot proceed—*Mohun Chunder Koondoo* vs. *Azeem Gazee*, 12 W. R., 45.

An application for fresh summons to appear should not be made until the first summons has been returned into Court—*Dowlut Munder* vs. *Omrao Singh Rana*, 14 W. R., 336; *Issur Chunder Sein* vs. *Aushotosh Chatterjee*, 1 Ind. Jur., N. S., 283;

and should be supported by a petition shewing that a fruitless endeavour had been made on the part of the plaintiff to serve the first summons, and that it was not by any default of his that he had failed—*Urquhart* vs. *Gilbert*, 1 Ind. Jur., N. S., 224. But see the case of *Hanlon* vs. *East India Branch Railway*, 1 Hyde, 197, where a new summons was granted on an objection raised to the sufficiency of service, without any petition. Where a party had failed for twelve months to serve notice of appeal on the respondent, a second notice was refused—*Dolee Chund* vs. *Nirban Singh*, 20 W. R., 62. Defendants were summoned under this section, but did not appear and made insufficient excuses. The Judge did not allow them to appear in the case, though two pleaders were present at the time of decision, and decided it as undefended. *Held*, he was right—*Joy Prakash Singh* vs. *Meghraj Singh*, 12 W. R., 207.

If the defendant voluntarily appears there seems no reason to issue a summons. Thus an insolvent defendant appeared at the filing of the plaint, and confessed judgment at the suit of one of his creditors; it was held that the Judge had no other course than to give judgment for the plaintiff; provided he was satisfied of the identity of the defendants, or that the advocate who appeared for them was duly instructed—*Bank of Bengal* vs. *Currie & Co.*, 3 B. L. R., 403.

Copy or statement annexed to summons.

65 Every such summons shall be accompanied with one of the copies or concise statements mentioned in section 58.

This section applies to H. C. and M. S. C. C.

Court may order defendant or plaintiff to appear in person.

66. If the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

If the Court sees reason to require the personal appearance of the plaintiff on the same day, it may make an order for such appearance.

This section applies to H. C. and M. S. C. C.

An order passed for the personal attendance of the plaintiff after his appearance by a pleader on the day fixed for the settlement of issues, and after their settlement was not deemed an order passed under section 42, Act VIII of 1859, or one to which the provisions of section 117, Act VIII, were applicable, although it might have been passed under section 127 or 166 of that Act. Further, looking at the severe penalties attached by the law to the non-attendance of parties ordered to attend, great caution and discretion should be used in ordering their personal attendance—*Juggurnath Pershad* vs. *Syud Bundeh Ali*, S. D., N. W., 1865, p. 371.

67. No party shall be ordered to appear in person unless he resides—

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits and at a place less than fifty or, where there is railway-communication for five-sixths of the distance between the place where he resides and the place where the Court is situate, two hundred miles from the Court-house.

No party to be ordered to appear in person unless resident within 50 or, where there is railway, 200 miles.

This section applies to H. C. and M. S. C. C.

The prohibition under this section to summon parties beyond the distance stated in it applies to rent suits. If a plaintiff improperly summoned fails to attend, and his suit is struck off, he should apply for a revival, shewing cause why he should not have been summoned, and that the Court's order is defective—*Sheikh Golam Bukshee* vs. *Pulton Singh*, 3 W. R., Act X, 162.

Summons to be either to settle issues or for final disposal.

68. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by Courts of Small Causes, the summons shall be for the final disposal of the suit.

This section applies to H. C. and M. S. C. C.

In Courts, other than Courts of Small Causes, the summons should always state whether the day fixed shall be for the settlement of issues or final disposal—*Syud Alberoodeen* vs. *Moulvee Mahomed Abusen*, Marsh., 307.

Fixing day for appearance of defendant.

69. The day for the appearance of the defendant shall be fixed by the Court with reference to its current business, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

What shall be deemed "sufficient time" must be determined with reference to the circumstances of the case.

This section applies to H. C. and M. S. C. C.

The Courts themselves should see that sufficient time is given to a defendant to appear and file his written statement—*Lokhenauth Thakoor* vs. *Sobanath Misser*, 5 W. R., Act X, 39; and if the time allowed is unreasonably short the Appellate Court can interfere—*Khadar Bhi* vs. *Rahiman Bhi*, 3 Mad., 167. What will be sufficient time in one case may in another be altogether insufficient. The nature of the rights involved, the importance of the claim, the distance of the parties from the Courts, and often various other circumstances, will be elements essential to the determination of what time is reasonably allowable. Two days have been held insufficient in a claim for six thousand rupees involving questions of Mahomedan law—*Khadar Bhi* vs. *Rahiman Bhi*, 3 Mad., 167. And when a summons was served on the 17th by affixing a copy, and the hearing of the suit was fixed for the 19th, and defendants were absent in Puna, it was held that the Subordinate Judge was bound, under section 113 of Act VIII, to postpone the hearing of the suit—*Chanbasappa* vs. *Mainaba*, 7 Bom., 138.

A person exempted from attendance on the Civil Court cannot be summoned under this section—*Maharaja Juggud Inder Buneweree* vs. *Soorjocoomar Chowdhree*, Marsh., 627.

Summons to order defendant to produce documents required by plaintiff or relied on by defendant.

70. The summons to appear and answer shall order the defendant to produce any document in his possession or power, containing evidence relating to the merits of the plaintiff's case, or upon which the defendant intends to rely in support of his case.

This section applies to H. C. and M. S. C. C. See note under section 63.

71. When the summons is for the final disposal of the suit, it shall direct the defendant to produce, on the day fixed for his appearance, the witnesses upon whose evidence he intends to rely in support of his case.

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

This section applies to H. C. and M. S. C. C.

The defendant can apply for summonses to his witnesses under section 159 any time after the delivery for service of the summons against the defendant.

Service of Summons.

72. The summons shall be delivered to the proper officer of the Court, to be served by him or one of his subordinates.

Delivery of summons for service.

This section applies to H. C. and M. S. C. C.

In the case of *Sagore Dutt* vs. *Ram Chunder Mitter*, 1 Hyde, 136, Wells, J., held—" The whole spirit and intention of Act VIII, 1859.. .. proceeds upon the assumption that every Court has a jurisdiction within certain limits, separate and distinct from every other Court, and its provisions are applicable only to Courts possessing such a jurisdiction, and acting on this he decided the High Court in its original civil jurisdiction could not serve its own process outside the local limits of its jurisdiction. No officer of any Court can execute a process beyond the local limits of its jurisdiction—*Kasim Azim Duplay* vs. *Kasim Mahomed Baracha*, 10 W. R., 349; 2 Ben., 59.

A special bailiff cannot be ordinarily employed to serve the summons (*id.*)

The employment of a special bailiff to serve a summons on his jurisdiction instead of serving in the manner described in section 85, post, would not vitiate the service—*Moharajah Mahashur* vs. *Baboo Hurruck*, 9 Moore, 268; *Mackintosh* vs. *Kally Doss Mullick*, 11 Ben., 1.

73. Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Mode of service.

This section applies to H. C. and M. S. C. C.

From the similarity of this section to section 154, Act X, 1872, it would appear that merely shewing the summons to the accused, without tendering or delivering a copy, is not good service—*Reg.* vs. *Karsanlal Danatram*, 5 Bom., Cr., 20.

74. When there are more defendants than one, service of the summons shall be made on each defendant:

Service on several defendants.

Provided that, if the defendants are partners, and the suit relates to a partnership transaction or to an actionable wrong in respect of which relief is claimable from the firm, the service may be made unless the Court directs otherwise either (*a*) on one defendant for himself and for the other defendants, or (*b*) on any person having the management of the business of the partnership at the principal place, within the local limits of the Court's ordinary original civil jurisdiction, of such business.

Judicature Acts, Order 9, Rule 6. This section applies to H. C. and M. S. C. C.

A partner or manager of the partnership business is an agent for absent partners or principals in suits connected with the partnership, but none else. See the conflicting decisions on this point—*Luchmeput Dogare* vs. *Sibnarain Mundla*, 1 Hyde, 97; and *Ram Chandra Bose* vs. *Snead*, 7 B. L. R., App., 58 See also the note under section 37, *supra*. In order that the service on one partner should be good as against the other partners, service must be made at the place where the partnership carry on business—*Kustoor Mull* vs. *Jokuram*, 11 B. L. R., App., 26.

Quaere.—Whether this section applies not only to a partnership existing at the time the plaint is filed, but also to a partnership dissolved before filing the plaint in respect of a cause of action arising during its existence—Ex-parte *Young*, 19 Ch. D., 124.

Service to be on defendant in person, when practicable, or on his agent.

75. Whenever it may be practicable, the service shall be made on the defendant in person, unless he have an agent empowered to accept the service, in which case service on such agent shall be sufficient.

This section applies to H. C. and M. S. C. C.

Agent empowered.—Gomashtas and am-mooktears looking after the affairs of the defendant are not ordinarily empowered—*Ram Soonduree Dassee* vs. *Ranee Surut Soonduree*, 17 W. R., 33. See also the note under section 37, *supra*.

Service on agent by whom defendant carries on business.

76. In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons issues, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

For the purpose of this section, the master of a ship is the agent of his owner or charterer.

This section applies to H. C. and M. S. C. C.

To satisfy the conditions of this section as to service of summons on an agent, there must be a person residing without the local jurisdiction, but carrying on such business or work within these limits by a manager or agent, and sued on account of such work, that is, business either actually itself carried on by the agent or manager, or forming part of the business in the sense of a connected course of transaction to the management of which he has been duly appointed—*Gocaldas Dwarkadas* vs. *Ganeshlal Halasroy*, I.L.R., 4 Bom., 416.

Formerly service on a ship's agent to whom the ship is consigned was good service on the owner in respect of matters connected with the ship—*Rajah Govindram* vs. *Brown*, 7 Bom., 97.

Service on agent in charge, in suits for immoveable property.

77. In a suit to obtain relief respecting, or compensation for wrong to, immoveable property, if the service cannot be made on the defendant in person, and the defendant have no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

This section applies to H. C.

When service may be on male member of defendant's family.

78. If in any suit the defendant cannot be found and if he have no agent empowered to accept the service of the summons on his behalf, the service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation.—A servant is not a member of the family within the meaning of this section.

This section applies to H. C. and M. S. C. C.

Person served to sign acknowledgment.

79. When the serving-officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

This section applies to H. C. and M. S. C. C.

Merely shewing a summons is not sufficient—*Queen* vs. *Karsalal Danatram*, 5 Bom., Cr. Cas., 20.

Procedure when defendant refuses to accept service,

80. If the defendant or other person refuses to sign the acknowledgment,

or if the serving-officer cannot find the defendant, and there is no agent empowered to accept the service of the summons on his behalf,

or cannot be found.

nor any other person on whom the service can be made,

the serving-officer shall affix a copy of the summons on the outer door of the house in which the defendant ordinarily resides and then return the original to the Court from which it issued, with a return endorsed thereon or annexed thereto, stating that he has so affixed the copy and the circumstances under which he did so.

This section applies to H. C. and M. S. C. C.

A copy of every summons not acknowledged by the party, or not actually served on him, must be affixed on the outer door of the house in which he ordinarily resides. On return of the summons the Court must proceed under section 82, and decide whether the summons has been duly served or not; and if not, whether a new summons shall issue or substituted service be directed—*Gopaul Dass* vs. *Greedharee Dass*, 6 W. R., 13; but a second summons cannot issue till the first one is returned to Court—*Issur Chunder Sein* vs. *Aushotosh Chatterjee*, 1 Ind. Jur., N. S., 283; *Dowlut Mundur* vs. *Omrao Singh Rana*, 14 W. R., 336; and see section 100, clause (b) *infra*.

Ordinarily resides.—The defendant should reside in the house in such a manner as to make it probable that knowledge of the summons will reach him—*Anantha Narayana* vs. *Periyana Kone*, 5 Mad., 101. It is not sufficient to affix a copy of the summons to the door of the defendant's place of business—*Chambasappa* vs. *Maenabi*, 7 Bom., 138; nor on his house if he has left it and the village two years before—*Anantha Narayana Periyana Kone*, 5 Mad., 101.

Return.—The return should be made in the words of the section, "the house in which he ordinarily resides." In Act VIII, 1859, the words were "the house in which the defendant is dwelling," and it was held that a return that a copy of the summons had been affixed to the "bati" or "house," was not sufficient, since the defendant might, for anything to the contrary before the Court, have any number of "houses"—*Buddoo Baboo* vs. *Lamlodar Mullick*, 1 Hyde, 132; but in *Ramcoomar Singh* vs. *Ramsoondhur Singh*, 17 W. R., 362, the word "bati" was held to mean a dwelling-house.

A Railway Company was, for the purposes of summons, held under Act VIII, to reside at its principal office—*Hanlon* vs. *The India Branch Railway*, 1 Hyde, 197, but now see section 17, explanation 2, *supra*.

Endorsement of time and manner of service.

81. The serving-officer shall, in all cases in which the summons has been served under section 79, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served.

This section applies to H. C. and M. S. C. C.

The return of the nazir is not sufficient proof of service—*Okhoy Chunder Dutt* vs. *Erskine & Co.*, 8 W. R., Mis., 11; *Raj Kishore Dutt* vs. *Bydonath Shaha*, 12 W. R., 365.

Examination of serving-officer.

82. When a summons is returned under section 80, the Court shall examine the serving-officer on oath touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Substituted service.

Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding the service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided, or in such other manner as the Court thinks fit.

This section applies to H. C. and M. S. C. C.

The procedure laid down in this section and section 80 has been applied to the service of an appeal notice on the respondent, where the appellant was unable to find the respondent at the place which he described as his place of residence when he brought the suit—*Bedhoo Koolanee* vs. *Bonomalee Gosain*, 11 W. R., 496.

Court is satisfied.—No order for substituted service should issue until the Court should record that it is satisfied, and the grounds on which it is satisfied, that the defendant is keeping out of the way in order to avoid service—*Rama Roy* vs. *Sridhar Pershad Narain Sahai*, 5 Cal., 397, following P. C., 19 W. R., 356; and that the summons cannot be served in the ordinary way—*Bishonath Sircar*, Petitioner, 3 W. R., Cr. R., 63; merely recording that the defendant cannot be found, instead of that the Court is satisfied he was keeping out of the way for the purpose of avoiding service, would not be sufficient—*Shew Doyal Singh* vs. *Gulam Singh*, 6. W. R., Cr., 73, 79.

Last resided—The Articles of an Association often provide that service on a member at his registered address shall be good service. This convention cannot override the law and make service of legal proceedings at that address good unless it is also his last residence—*Ex-parte Chalen*, L. R., 10 Ch. App., 229.

Effect of substituted service.

83. The service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

This section applies to H. C. and M. S. C. C.

Substituted service is as good as if the defendant had been served in person. Substituted service having been effected on a defendant, he applied to set aside the decree on the ground of having no notice, and that he had a good defence on the merits; it was held that it could not be set aside—*Kessur Chand* vs. *Bhoobuneisur Chunder*, Bourke 27.

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The object of such service is to enable plaintiffs to have relief more promptly, not to relieve them of any difficulty in pleading. Plaintiff, treating a colonial government as a corporation, sued it as "The Government of New Zealand," and attempted to proceed upon substituted service on the solicitor for the colony, although the latter stated he had no authority to appear. *Held*, that substituted service only applied to cases in which there could be (if there were no difficulties in the way) personal service, and was never intended to be allowed where personal service could not be effected because the plaintiff did not know how to describe the parties he sought to sue—*Sloman* vs. *Government of New Zealand*, 1 C. P. D., 563.

Endorsement.—An endorsement is required only where personal service has been made, or the summons returned under section 80; no endorsement is necessary, apparently, in cases of substituted service—*Dymond* vs. *Croft*, 5 Ch. D., 512.

When service is substituted time for appearance to be fixed.

84. Whenever service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

This section applies to H. C. and M. S. C. C.

A sufficient time ought to be given for notice of the substituted service to reach the defendant wherever he may be—*Mirza Ali Bebanee* vs. *Syed Hyder Hoosein*, I. L. R., 2 Bom., 449.

Service of summons when defendant resides within jurisdiction of another Court and has no agent to accept service.

85. If the defendant resides within the jurisdiction of any Court other than the Court in which the suit is instituted, and has no agent resident within the local limits of the jurisdiction of the latter Court empowered to accept the service of the summons, such Court shall send the summons, either by one of its officers or by post, to any Court, not being a High Court, having jurisdiction at the place where the defendant resides, by which it can be conveniently served, and shall fix such time for the appearance of the defendant as the case may require.

The Court to which the summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court, and shall then return the summons to the Court from which it originally issued, together with the record (if any) made under this paragraph.

This section applies to H. C. and M. S. C. C.

See note on section 72.

Service within presidency towns and Rangoon of process issued by Provincial Courts.

86. Whenever any process issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such town, it shall be sent to the Court of Small Causes, within whose jurisdiction the process is to be served,

and such Court of Small Causes shall deal with such process in the same manner as if the process had been issued by itself,

and shall then return the process to the Court from which it issued.

This section applies to H. C., P. S. C. C. and M. S. C. C.

Service on defendant in jail.

87. If the defendant be in jail, the summons shall be delivered to the officer in charge of the jail in which the defendant is confined, and such officer shall cause the summons to be served upon the defendant.

The summons shall be returned to the Court from which it issued, with a statement of the service endorsed thereon and signed by the officer in charge of the jail and by the defendant.

This section applies to H. C. and M. S. C. C.

Wilson, J., held that the endorsement under this section, is evidence of the service of summons: it ranks higher than a nazir's return. But see *Bland* vs. *Bland*, L. R., 3 P. and D., 233.

In India a life-convict is not civilly dead—*Sheonarain Singh* vs. *Sheobuggun Koer*, S., D., N. W., 1853, p. 759.

Procedure if jail be in a different district.

88. If the jail in which the defendant is confined is not in the district in which the suit is instituted, the summons may be sent by post or otherwise to the officer in charge of such jail, and such officer shall cause the summons to be served upon the defendant, and shall return the summons to the Court from which it issued, with a statement of the service endorsed thereon, and signed as provided in section **87**.

This section applies to H. C. and M. S. C. C.

Service when defendant resides out of British India and has no agent to accept service.

89. If the defendant resides out of British India, and has no agent in British India empowered to accept the service, the summons shall be addressed to the defendant at the place where he is residing, and forwarded to him by post if there be postal communication between such place and the place where the Court is situate.

This section applies to H. C. and M. S. C. C.

It was held under Act VIII, 1859, that a summons could not be sent by post to any place for which letters are not registered by a Post Office; but the decision there turned on the interpretation to be put on section 66, Act VIII, of 1859, which has been excluded from this Code, and the words in the text, "if there be postal communication between such place and the place where Court is situate," have been added. See *Kasim Azim Duplay* vs. *Kasim Mahomed Baracha*, 2 Ben., 59; 10 W. R., 349. But see section 95, *infra*.

In practice the summons is forwarded under a registered cover, and if the party does not appear, a verified statement should be put in to shew that he is or has recently been residing in the place to which the summons was sent - *Sonatun Bukshee* vs. *Gopal Chunder Shamunto*, 15 W. R., 31. A person refusing a registered letter sent by post cannot plead ignorance of its contents—*Lootf Ali Meah* vs. *Pearee Mohun Roy*, 16 W. R., 223.

Summonses and processes for service in the Terai should be forwarded direct to the Subah of the Terai and not to Katmandhu—9 C. L. (N. W)., 1871.

Service through British Resident or Agent of Government.

90. If there be a British Resident or Agent of Government in or for the territory in which the defendant resides, the summons may be sent to such Resident or Agent, by post or otherwise, for the purpose of being served upon the defendant; and if the Resident or Agent returns the summons with an endorsement under his hand that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be conclusive evidence of the service.

This section applies to H. C. and M. S. C. C.

Substitution of letter for summons

91. The Court may, notwithstanding anything hereinbefore contained, substitute for the summons a letter signed by the Judge or such officer as he appoints in this behalf, when the defendant is, in the opinion of the Court, of a rank which entitles him to such mark of consideration.

The letter shall contain all the particulars required to be stated in the summons, and, subject to the provisions contained in section 92, shall be treated in all respects as a summons.

This section applies to H. C. and M. S. C. C.

Mode of sending such letter.

92. When a letter is so substituted for a summons, it may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; unless the defendant has an agent empowed to accept service of summons, in which case the letter may be delivered or sent to such agent.

This section applies to H. C. and M. S. C. C.

A special messenger cannot be sent to serve civil process in a foreign territory—*Kusim Azim Duplay* vs. *Kasim Mahomed Baracha*, 2 B. L. R., 59; 10 W. R., 349.

Service of Process.

Process to be served at expense of party issuing.

93. Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Costs of service.

The Court-fee leviable for such service shall be levied within a time to be fixed by the Court before the process is issued.

This section applies to H. C. and M. S. C. C.

The words "within a period to be fixed by the Court issuing this process" have been omitted. Under Act XXIII of 1861, the Courts should, on receipt and registration of a plaint or memorandum of appeal, and when fixing the date for the hearing of the case, also fix the period within which the costs of the service of the summons or notice on defendant or respondent should be paid. A reasonable period should be fixed, and if the necessary the Courts should inflict the penalty prescribed by section 5, on failure to deposit the cost—10 Civ. L. (N. W.), 1868. Where no period was fixed, and the processes were not served for four months, and the Court dismissed the suit because the plaintiff produced no evidence in support of his claim, the case was remanded—*Lalla Prasaud Lall* vs. *Lalla Umbica Prasaud*, 3 B. L. R., App., 25; 11 W. R., 290. Under the present law there is no necessity to fix a period, and the practice is the same as under section 23, Act VIII, 1859. And if a party has ample opportunity to deposit fees, and does not do so, his suit may be dismissed under section 97, *infra*.

Notices and orders in writing how served.

94. All notices and orders required by this Code to be given to or served on any person shall be in writing, and shall be served in the manner hereinbefore provided for the service of summons.

This section applies to H. C. and M. S. C. C.

As to attaching a debt due by a person out of British India, see—*Gramshamlal* vs. *Bhansalal*, I. L. R., 5 Bom., 249.

Postage.

Postage.

95. Postage, where chargeable on any notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed by the Court before the communication is forwarded:—

Provided that the Local Government, with the previous sanction of the Governor General in Council, may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

This section applies to H. C. and M. S. C. C.

CHAPTER VII.

OF THE APPEARANCE OF THE PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

Parties to appear on day fixed in summons for defendant to appear and answer.

96. On the day fixed in the summons for the defendants to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard, unless the hearing be adjourned to a future day fixed by the Court.

This section applies to H. C. and M. S. C. C.

Plaintiffs must be represented by the same pleader or set of pleaders, and can not be generally represented by different pleaders—*Jankibai* vs. *Atmaram Baturat*, 8 Bom 241. See note under section 179, post.

In person or by their respective pleaders.—See note on *ex-parte*, under section 100.

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay fee for issuing.

97. If, on the day so fixed for the defendant to appear and answer, it be found that the summons has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, the Court may order that the suit be dismissed:

Proviso.

Provided that no such order shall be passed, although the summons has not been served upon the defendant, if, on the day fixed for him to appear and answer, he attends in person or by agent, when he is allowed to appear by agent.

This section applies to H. C. and M. S. C. C.

The proper course for a Judge to adopt, when the original defendant, or a person added as a co-defendant, has not been served with summons and does not appear, is to dismiss the suit under this section, leaving the plaintiff, if he has omitted to pay the costs through accident, &c., to apply to the Court for a fresh summons, or file a new suit (section 99)—*Shek Abas* vs. *Ibrahimji*, 5 Bom., 118; but in no case should the case be disposed of before the date fixed for hearing—*Gulab Dal* vs. *Jiwan Ram*, I. L. R., 2 Alla., 318.

In the High Court if defendant enters appearance before the time fixed in the summons the Court has power to order a case to be set down in the General Cause List, and the Registrar should do so or ask the Judge in chambers whether he should do so or not—*Cumming* vs. *Green*, 4 B. L. R., App., 75.

An appeal admitted on the 8th of March was set down for hearing on the 9th of April. It was not taken up that day, and on the 19th appellant applied to pay the costs of serving the respondent, but his application was refused. The Court dismissed the case, remarking on the defence raised (that the mistake had occurred through the fault of an ignorant karpardaz), that the party should have employed a vakil, and that such a mistake should not be allowed to pass, unless it was clear that it had been committed in good faith—*Pran Chunder Roy* vs. *Juggessur Mookerjee*, 11 W. R., 417.

Appeal.—Formerly it was considered that an order, similar to that passed under this section was not a decision—*Shaikh Mouzzum Ali* vs. *Sheo Lal Jha*, 4 W. R., Act X, 45; *Mudhusoodhun Ghosal* vs. *Seedhessuree Debia*, 4 W. R., 85; and this seems to have been the opinion of Couch, C. J., in *Sheik Abas* vs. *Ibrahimji*, 5 Bom., 118. A contrary opinion was expressed in *Donobundhoo Chutterag* vs. *Beharee Lall Mookerjee*, 3 W. R., Mis., 23; and, following this decision, *Indur Chunder Baboo* vs. *Oozeer Ali Jan*, 7 W. R., 338; but see the remarks of Phear, J., on these cases in *Kali Kisto Chunder*, vs. *Hureehur Chuckerbutty*, 10 W. R., 160. It is a decree under this code.

If neither party appears, suit to be dismissed.

98. If on the day fixed for the defendant to appear and answer, or on any other subsequent day to which the hearing of the suit is adjourned, neither party appears, the suit shall be dismissed, unless the Judge, for reasons to be recorded under his hand, otherwise directs.

This section applies to H. C. and M. S. C. C.

This section only refers to cases in which both parties are absent on the date fixed for the hearing. It does not apply where a party is present, but has omitted to serve a notice as required by the Court—*Haradhun Chuckerbutty* vs. *Protap Narain Chowdhry*, 14 W. R., 401. It applies to miscellaneous proceedings—*Rajpal* vs. *Chooramun*, 4 Alla., 10; and proceedings in execution—*Gour Mohun Bandopadhya* vs. *Tara Chand Bandopadhya*, 3 B. L. R., App., 17.

In the case of *Comalammal* vs. *Rungasawmy Iyengar*, 4 Mad., 56, the High Court said, with reference to section 110, Act VIII of 1859—"It might appear at first sight that section 147 is unnecessary, because section 110 itself provides for the case of

non-appearance of the parties on the day fixed for defendant to appear and answer, or on any other day subsequent thereto to which the hearing of the suit may be adjourned; but it appears to us that this section and sections 111 to 114 have reference only to the first hearing of the suit, which may be either on the day named in the summons, or on a subsequent day to which the first hearing may have been adjourned."

In such case plaintiff may bring fresh suit.

99. Whenever a suit is dismissed under section 97 or section 98, the plaintiff may (subject to the law of limitation) bring a fresh suit; or if, within the period of thirty days from the date of the order dismissing the suit, he satisfies the Court that there was a sufficient excuse for his not paying the court-fee required within the time allowed for the service of the summons, or for his non-appearance, as the case may be, the Court shall pass an order to set aside the dismissal and appoint a day for proceeding with the suit.

or Court may restore the suit to its file.

This section applies to H. C. and M. S. C. C.

This section applies to miscellaneous proceedings in execution—*Rajpal* vs. *Chooramun*, 4 Alla., 10; *Gaur Mohun Bandopadhya* vs. *Tarachand Bandopadhya*, 3 B. L. R., App., 17; see also section 647, *infra*.

In order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing," it is enough that he should shew that there has been a *bonâ fide* mistake which was not unreasonable—*Hardatrai Shrikisandas* vs. *Bullion Association*, 3 Bom., 60.

If a suit is dismissed before the day fixed for hearing on failure to deposit *Tolabana*, this irregularity on the part of the Judge does not deprive the plaintiff of his right to bring a new suit under this section—*Galab Dai* vs. *Jiwan Ram*, I. L. R., 2 Alla., 318.

Appeal.—No appeal lies from an order refusing to set aside a dismissal. The only remedy left is a new suit—*Indur Chunder Baboo* vs. *Ooseer Ali Khan*, 7 W. R., 338; *Chowdhry Ruttun Pershad* vs. *Hunooman Jah*, W. R., 1864, Mis., 20; *Lokenath Sahoo* vs. *Tukeer Singh*, Marsh., 630. In the North-West the practice was different—*Rajpal* vs. *Chooramun*, 4 Alla., 10.

Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons.

99A. If, after a summons has, whether before or after the first day of June, 1882, been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from such return to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may dismiss the suit as against such defendant.

In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Procedure if only plaintiff appears.

100. If the plaintiff appears and the defendant does not appear, the procedure shall be as follows:

When summons was duly served

(*a*) if it is proved that the summons was duly served, the Court may proceed *ex-parte*:

(*b*) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant:

when summons not duly served.

(*c*) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

when summons served, but not in a due time.

If it is owing to the plaintiff's default that the summons was not served in sufficient time, the Court shall order him to pay the costs occasioned by such postponement.

This section applies to H. C. and M. S. C. C.

When the plaintiff appears and the defendant does not appear, the precedent laid down by this section must be followed whether the defendant has been summoned only to appear and answer the claim; or has in addition been summoned to attend and give evidence—*Taruck Nath Mullick* vs. *Jeamat Nosya*, I. L. R., 5 Cal., 353.

The cause should not be tried *ex-parte* unless service of summons has been satisfactorily proved—23 W. R., Civ. Cir., 4; but it is not necessary that all the processes for procuring the attendance of the defendant as a witness should be exhausted. Proof of service of summons is sufficient, and if this was given the Judge should follow one or other of the courses laid down in clause (*b*) and (*c*)—*Taruck Nath Mullick* vs. *Jeamat Nosya*, I. L. R., 5 Cal., 353; and unless there is some evidence of service of summons on the record, a decree *ex-parte* has no legal effect—*Ram Lochun Soor* vs. *Nittya Kalee Debia*, 12 W. R., 211. The mere absence of the defendant does not justify the presumption that the suit is true; the Court is bound to see that at least a *prima facie* case is made out—*Amrit Nath Jha* vs. *Roy Dhunput Singh*, 15 W. R., 503.

Ex-parte.—Where a party failed to appear in person in obedience to a personal summons but appeared by pleader—*Baboo Moona Laul* vs. *Baboo Gopal Singh*, S. D., N. W., 1863, p. 37, or appeared by pleader duly appointed, but the pleader was not instructed to answer or instructed not to answer at all—*Bhimacharya* vs. *Fukirappa*, 4 Bom., 206 (not followed in Bengal—*Dhan Bhagut* vs. *Ramessur Dut Singh*, 20 W. R., 53), or by Counsel who moved for an adjournment, and on being refused did not appear for want of instructions, such party has not appeared under this section —*The Administrator General of Bengal* vs. *Lala Dyaram Dass*, 6 B. L. R., 688; so, merely filing a vakalutnama, and when the case comes on not appearing in person or by pleader, is not an appearance—*Mussamul Bibee Haloo* vs. *Mussamut Atwaro*, 7 W. R., 81; nor is putting in a written statement under similar circumstances —*Purus Ram* vs. *Juyuntee Pershau*, 1 Alla., 154. And where one of several defendants duly served did not appear until nearly a month after the date fixed for first hearing, and then applied by vakil to be heard in answer under the last part of section III. of Act VIII, of 1859, and his application was rejected and judgment given against him; *Held*, the conduct of the defendant did not amount to an appearance, and that the suit was decided *ex-parte*—*Syud Mahomed Hossein* vs. *Shaik Muatozul Huq*, 8 W. R., 400.

Not ex-parte.—The case is not *ex-parte* if the defendant has appeared in person or by pleader, though he may have neither filed a written statement—*Goluckbur* vs. *Bishonath Geeree*, Marsh., 32, nor made a verbal one—*Jankee Ram Doss* vs. *Chundrabully Debia*, 7 W. R., 295. Where the defendant, though absent when the case commenced, appeared before judgment was recorded and gave evidence—*Gora Chund Gossammee* vs. *Rugho Mundul*, 12 W. R., 169, and where a person was added as co-defendant, and appeared though protesting that he had not time to prepare his defence—*Kumara Upendra Dev* vs. *Nobtu Krisho Bose*, 3 Ben., 113, it was held *ex-parte*. A decree was obtained on a solenamah. One of the defendants appeared and said she had no notice of the suit, that the solemnmah was a forgery, and asked for an enquiry and relief. *Held*, the decree was not an *ex-parte* decree—*Hemmo Moyee Dayee* vs. *Watson and Co.*, 14 W. R., 299.

The default committed must be by the non-appearance of the defendant, and where a case has been decreed against him, and in his presence, for want of witnesses or proof to rebut the case of the plaintiff, this section will not apply.

(*b.*)—The first summons should be returned before a second should issue. A Judge has, under Rule 12 of the Calcutta High Court, dated May 1875, a discretion as to granting a second summons, and is bound to enquire into the circumstances under which it is applied for, and where there has been great and unexplained delay he should refuse it—*Gourchurn Soor* vs. *Peary Lall Paul*, 15 B. L. R., App. 12.

(*c.*)—If the summons has not been served in sufficient time to enable the defendant to appear, the Court is bound to postpone the hearing to a future date, and on this principle it has been held, in a case in which the defendant was served at 10 o'clock in the morning to appear at 12 o'clock on the same day, and did appear, that he should have been granted an adjournment—*Shaikh Awlad* vs *Shaik Adool Kureem*, 18 W. R., 141. A defendant did not appear; it was alleged that he was insane, and the Judge struck off the case. It was held that the Judge was wrong, and ought to have made the enquiry contemplated in Act XXXV of 1858—*Mussamut Moorut Koonwur* vs. *Dhurm Narain Singh*, 2 W. R., Mis., 7.

Remedies.—The defendant can apply under section 108, *infra*, within the period of limitation, if the circumstances are such as will bring the case within it, or, if not, at any reasonable time for a review under the general law—*Mewa Lall Thakoor* vs. *Bhujhun Jha*, 22 W. R., 213; *Bishen Perkash Singh* vs. *Ruttun Geer Chela*, 20 W. R., 3; but the technical word "review" will not prevent the Courts from looking on the order as one passed under this section, if the circumstances clearly point that way—*Khoob Lall Sahoo* vs. *Shaik Kadir Buksh*, 15 W. R., 431. The defendant can also without resorting to the procedure under section 108 appeal from the *ex-parte decree*—*Ashruffunnissa* vs. *Lehareaux*, I. L R., 8 Cal. 272.

The Dekkhan Ryots Act (XVII of 1879)—This section is affected by Act XVII. of 1879—*Duli Chand* vs. *Dhondi*, I. L. R., 5 Bom., 184.

Procedure where defendant appears on day of adjourned hearing, and assigns good cause for previous non-appearance.

101. If the Court has adjourned the hearing of the suit *ex-parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit, as if he had appeared on the day fixed for his appearance.

This section applies to H. C. and M. S. C, C.

Defendant did not attend for nearly a month after the date fixed for first hearing, and then he applied through his pleader to be heard in answer. He failed to show any good or sufficient cause for his previous non-appearance, and judgment was given against him. *Held*, that (1) the judgment was *ex-parte*, that (2) the only remedy was re-hearing by the Original Court, and that (3) no appeal lay from the order—*Syud Mahomed Hosseein* vs. *Shaik Muntozul Huq.*, 18 W. R., 400. Under this Code no appeal lies from such an order (section 588).

Procedure where defendant only appears.

102. If the defendant appears and the plaintiff does not appear, the Court shall dismiss the suit, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

This section applies to H. C. and M. S. C. C.

This section applies to execution proceedings—*Gaur Mohan Bandopadhya* vs. *Tarachand Bandopadhya*, 3 B. L. R., App., 17; see section 647. Where judgment-debtors appearing raised objections to the execution of a decree, and the Court, after investigation, passed judgment in the absence of the decree-holder, it was held that, if aggrieved, he might apply for a re-hearing under section 119, Act VIII. of 1859

(section 103, *infra*)—*Kalee Kristo Thakoor* vs. *Mahomed Kader*, 12 W. R., 428. Where a commission has issued for a local examination, and the Commissioner requires the attendance of the parties, should the defendant appear and the plaintiff make default in appearing on the day appointed, the proper course is for the Commissioner to dismiss the suit under this section—*Eshanchunder Chuckerbutty* vs. *Soorjo Loll Gosain*, Marsh., 139.

A suit cannot be dismissed under this section for non-attendance of witnesses—*Mahomed Azeemoollah* vs. *Ali Buksh*, 5 Alla., 74.

Judgment.—The suit should be either dismissed or decreed; "struck off" is not a proper mode of disposing of the case, and has no legal effect. Thus, where defendant pleaded that a previous suit on the same cause of action had been dismissed under this section, and the final order was "number kharij," it was held that no judgment had been passed, and the plea of *res judicata* must fail—*Khoob Lall Singh* vs. *Toolsee Singh*, 17 W. R., 219; but where an Appellate Court "struck off" a case instead of using the correct expression, the Court held that, practically as regards procedure, the case had been decided *ex-parte*—*Beejoy Gobind Sircar* vs. *Radha Benode Misser*, 10 W. R., 348.

Appeal.—By section 119, Act VIII, 1859, it was declared that "no appeal shall lie from a judgment against plaintiff by default for non-appearance." These words do not exist in the present Code, and it appears that plaintiff cannot only appeal but take advantage of the procedure allowed under section 103 in Bengal, Bombay and Madras *Asbruffunnissa* vs. *Leharreax*, I. L. R., 8 Cal., 272; *Luckmidas* vs. *Ebrahim*, I. L. R., 2 Bom., 644; *Modalalba*, I. L. R., 2 Mad., 75; but not in the North-West—*Lalsingh* vs. *Kunjan*, I. L. R., 4 Alla. 387.

Where a suit was improperly decided under section 114, Act VIII, 1859 (this section) and was remanded on appeal that it might be decided under section 148, it held that fresh evidence could not be taken, but that the case should have been decided on the record—*Padma Lochan* vs. *Sirdar Khan*, 3 B. L. R., App., 91.

Decree against plaintiff by default bars fresh suit.

103. When a suit is wholly or partially dismissed under section 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside; and, if it be proved that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall set aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

No order shall be made under this section unless the plaintiff has served the defendant with notice in writing of his application.

This section applies to H. C. and M. S. C. C.

This section applies to miscellaneous proceedings—*Seetul Pershad* vs. *Mahomed Kureem Khan*, 5 Alla., 164; *Kalee Kristo Thakoor* vs. *Mahomed Kader*, 12 W. R., 428; to rent cases in Bengal—*Oodwunt Mahtoon* vs. *Bidhee Chund Chowdhry*, 18 W. R., 207; but only to original cases—*Ram Lall Chowdhry* vs. *Giridaree Jha*, W. R., 1864, Mis., 21; and not to cases in appeal—*Anonymus Case*, 1 Ind. Jur., O. S., 68; *Omda Bibee* vs. *Acowrie Singh*, 7 W. R., 425; *Devappa Setti* vs. *Ramanadha Bhatt*, 3 Mad., 109; *Zimutunnissa Bibee* vs. *Muddun Mohun Pal*, 22 W. R., 537; see the special procedure on hearing appeals laid down in Chapter XLI, section 555, *et seq.*

Whether this section, and as a consequence section 102, applies to adjourned hearings, or, only to the first hearing, has not been definitely determined. In the case of *Eshan Chunder Chuckerbutty* vs. *Soorjo Lall Gossain*, Marsh., 139, the suit was dismissed for plaintiff's default in appearing before a Commissioner sent to make a local investigation. It was urged in appeal that section 114, Act VIII of 1859 (corresponding to section 102) did not apply, as the parties were present in the Judge's Court by means of their vakils; the Court (Peacock, C.J., Bayley, J., and Kemp, J.) overruled the objection, and decided that that section applied. But in *Comalammal* vs. *Rungasawmy Iyengar*, 4 Mad., 59, the Madras High Court decided that section 114 had reference only to the first hearing of the suit, which may be

either the day named in the summons or a subsequent day to which the first hearing may have been adjourned. In reality the question never arose, as the case did not refer to default by non-appearance, but default by failing to produce evidence. By section 157, *infra*, the present procedure applies to any day to which the hearing of the suit may be adjourned.

This section does not apply to suits dismissed for any other reason than non-appearance. When the first hearing of the case took place on the 16th of November, and the final hearing was fixed for the 22nd of January, and on the 23rd plaintiff's vakil stated that since his witnesses had not appeared he could not go on with the case, and it was dismissed: *Held*, the dismissal was not under section 119, but section 148 (corresponding to section 158, *infra*) —*Comalammal* vs. *Rungasawmy Iyengar*, 4 Mad., 56; *Mussamut Furzana* vs. *Ali Buksh*, 5 Alla., 74; *Kashi Parshad* vs. *Debi Das*, 7 Alla., 77. And where a case was dismissed in "default of prosecution" on the ground that the plaintiff fail to deposit talabana, the order was not considered to be an order passed under this section—*Ram Sundar Singh* vs. *Ram Bandhan Singh*, 7 Alla., 126. So also where it was dismissed because neither plaintiff nor his pleader appeared on the day fixed for hearing the arguments, it was held this section did not apply—*Rai Chand* vs. *Mathura Prasad*, I. L. R., 3 Alla., 292. In such cases no review can be granted under this section, but only under the ordinary law for review of judgment—*Ram Sunder* vs. *Ram Bhandan*, 7 Alla., 126.

Appeal.—An appeal lies from an order refusing to set aside the dismissal of a suit which is itself open to appeal (section 588), but no appeal lies against an order directing a suit to be readmitted—*Hirdhamun Sha* vs. *Jinghoor Sha*, I. L. R., 5 Cal., 711; an appeal will also lie against the decree—*Ashruffunesse* vs. *Lehareaux*, I. L. R., 8 Cal., 272. See the cases cited under "APPEAL," Section 102.

Procedure where defendant residing out of British India does not appear.

104. If, on the day fixed for the hearing of a suit against a defendant residing out of British India, who has no agent empowered to accept service of summons, or on any day to which the hearing has been adjourned, the defendant does not appear, the plaintiff may apply to the Court for permission to proceed with his suit, and the Court may direct that the plaintiff be at liberty to proceed with his suit in such manner and subject to such conditions as the Court thinks fit.

This section applies to H. C. and M. S. C. C.

Procedure in case of non-attendance of one or more of several plaintiffs.

105. If there be more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, and pass such order as it thinks fit.

This section applies to H. C. and M. S. C. C.

Procedure in case of non-attendance of one or more of several defendants.

106. If there be more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of passing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

This section applies to H. C. and M. S. C. C.

Where all the defendants did not appear, and, the case proceeding under this section, an ordinary decree was given against them all, it was held that the decree was not an *ex-parte* decree against the absent defendants—*Doorga Churn Sett* vs. *Shamasund Gossain*, 12 W. R., 376.

107. If a plaintiff or defendant, who has been ordered to appear in person under the provisions of section 66 or section 436, does not appear in person, or shew sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing sections applicable to plaintiffs and defendants, respectively, who do not appear.

Consequence of non-attendance, without sufficient cause shown of party ordered to appear in person.

This section applies to H. C. and M. S. C. C.

A person failing to appear in person in obedience to a personal summons may have the case decided *ex-parte* against him, notwithstanding his pleader be present—*Baboo Monee Laul* vs. *Baboo Gopal Singh*, S. D., N. W., 1863, p. 37; *Kistodhone Dutt* vs. *Rajah Nilmoney Singh*, Coryton, 3.

Of setting aside Decrees ex-parte.

108. In any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside:

Setting aside decree *ex-parte* against a defendant.

And if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into court or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit.

This section applies to H. C. and M. S. C. C.

When an application made under this section is rejected, no appeal lies against the order of rejection; but an appeal will lie from the original decree.

As to appealing from an *ex-parte* decree see note under section 102, *ante*.

109. No decree shall be set aside on any such application as aforesaid, unless notice thereof in writing has been served on the opposite party.

No decree to be set aside without notice to opposite party.

This section applies to H. C. and M. S. C. C.

Ex-parte.—See note under section 100.

Execution.—This section applies to execution proceedings—*Gour Mohun Bundapadya* vs. *Tarachand Bundapadya*, 3 B. L. R., App, 17; *Rajpal* vs. *Chooraman* 4 Alla., 10.

In section 108, Act X of 1877 the words were "in any case in which a decree is passed *ex-parte* against a defendant under section 100," and it was not clear whether that section applied to cases where the decree was passed on a day to which the case has been adjourned, or was its effect confined to the first hearing? The corresponding section of Act VIII of 1859 was held to refer only to the first hearing in *Comalammal* vs. *Rungasawmy Iyengar*, 4 Mad., 56; but that point did not arise in the case. A decision to the same effect was passed in the case of *Gorachand Goswami* vs. *Raghu Mandal*, 3 B. L. R., App., 121. On the other hand, it was decided in *Kalee Churn Dutt* vs. *Modhoo Soodun Ghose*, 6 W. R., 86, that the corresponding section of Act VIII of 1859 applied to all cases decided *ex-parte* on certain grounds; but at the same time the defendant was not debarred from appealing by the express words of that section (now omitted in Act X 1877) if the default by non-appearance had taken place at an adjourned hearing—*Kalee Churn Dutt* vs. *Modhoo Soodun Ghose*, 6 W. R., 86; and in *Denoo Paroye* vs. *Chinta Monee Chowdhry*, 18 W. R., 457, it was held that, where a defendant is prevented from appearing on the last day through the fraud of his adversary, the decision is an *ex-parte* decision within this section, although he has been present at the first hearing. The balance of authority, as well as section 157, was in favour of the contention that section 108 applied to all cases where the decision had been passed in the absence of the defendant. The omission of the words "under section 100" in the present Act removes all doubt as to the proper interpretation of these sections.

But this section will not apply where the case has been dismissed not for default by non-appearance but for something else. Thus, on the day fixed for hearing, defendant's

pleader obtained an adjournment to procure certain documents and put in written statements. He failed to do either, and on the day fixed the case was decreed in favour of the plaintiff. It was held that the decree was under section 148, Act VIII of 1859 (section 158, *infra*), and not under section 119, Act VIII of 1859 (this and the previous section)—*Rangasawmy Mudelliar* vs. *Sirangar*, 4 Mad., 254.

Sufficient Cause.—A *bona fide* mistake which is not unreasonable is sufficient to have the case restored; such as supposing a month to mean a calendar month—*Hardatrai Shrikisandas* vs. *Victoria Finance Association*, 3 Bom., 60. Where it was the duty of an attorney's clerk to examine every evening the board for next day and inform his master, and, the former neglecting his duty, no one appeared, and the case was disposed of in default; it was restored on payment of the costs of the hearing—*The Oriental Finance Corporation* vs. *The Mercantile Credit and Finance Corporation*, 2 Bom., 267, and where defendant was not represented at the trial, because his solicitor was ignorant of the fact that the suit had been transferred to another Judge, the *ex-parte* judgment was set aside on payment of the costs of the day—*Burgoine* vs. *Taylor*, 9 Ch. D., 1.

It is sufficient for an infant to show that his guardian was negligent—*Kesho Pershad* vs. *Huday Narain*, 6 C. L. R., 69; but the fact that the counsel or pleader may have been engaged elsewhere is not sufficient—*Raj Narain Burdhun* vs. *Akroor Chunder Roy*, 24 W. R., 141. Where the absence was due to an understanding which had been come to between the parties for an adjournment on account of the illness of an absent witness, the suit was restored on an affidavit to that effect—*Damodur Doss* vs. *Choonee Bebee*, 2 Hyde, 216; or the absent party had no intimation when the case would come on *ex-parte*—*Mani Shunkar Hargovan*, 2 Bom., 381; and so if the defendant proves that he has not been served with summons at all—*Anund Moyee Dossee* vs. *Anund Soondur Mozoomdar*, 13 W. R., 237; or not in sufficient time to appear—*Shaik Awlad* vs. *Shaikh Aldool Kureem* 18 W. R., 141, or has been improperly served—*Chanbasappa* vs. *Mainaba*, 7 Bom., A. C. 138; and where it was shown that there was only one summons, and that the serving-officer had merely posted it on the door of one of the defendants, without attempting to serve him personally, it was held that all the defendants were entitled to have the suit restored—*Shiboo Roy* vs. *Kashee Roy*, 25 W. R., 394, otherwise as regards the one defendant if he had been properly served—*Ewing* vs. *Ghosaidas Ghose* 3 B. L. R., 7.

A suit was remanded for trial by an order dated the 28th of December. It was dismissed for default on the 8th of January. *Held*, that the date was such as precluded the party most interested from appearing, and that an application made soon after by petitioner as representative of a former party, to have his name substituted and the case revived, should have been acceded to—*Haradhun Chuckerbutty* vs. *Protap Narain Chowdhry*, 14 W. R., 401.

Sufficient cause is proved either by the oath of the petitioner, or by petition supported by an affidavit—*Damodur Dos* vs. *Choonee Bebee*, 2 Hyde, 226; *Hardatrai Shrikisandas* vs. *Victoria Finance Association*, 3 Bom., 60; *Anund Moyee Dossee* vs. *Anund Soondur Mozoomdar*, 13 W. R., 237; and if the requirements of the section are carried out, the application cannot be refused on other grounds, such as that the ancestors of the applicants were parties to the original proceedings out of which the case arose—*Doorgaranee Dossee* vs. *Jadub Chunder Thakoor*, 5 W. R., Mis., 11.

The onus of proof lies on the applicant—*Shaikh Torab Ali* vs. *Chooramun Singh*, 24 W. R., 262; but if he makes out a *primâ facie* case, the other party must rebut it—*Mussamut Jhutoo Kooer* vs. *Lulita Kooer*, 22 W. R., 423.

Limitation.—Under article 164, Sched. II. of the Limitation Act, the application should be made within 30 days from the date of executing any process for enforcing judgment. This thirty days begins to run from the first actual and complete execution of any process—*Shaikh Gholam Ahyah* vs. *Sham Soondur Koonwaree*, 7 W. R., 378; whether against the person or property of the defendant—*Shib Chunder Bhadooree* vs. *Luckhee Debia Chowdhrain*, 6 W. R., Mis., 51; and process against the person of the debtor is not necessary—*Baba Bruhm Purgash* vs. *Dumree Lall*, 1 Alla., 133. Thus attachment, irrespective of the sale under it, was sufficient—*Radha Binode Chowdhry* vs. *Digamburee Dassee*, 9 W. R., 236; overruling *Radha Binode Chowdhry* vs. *Modhoo Soodun Sircar*, 7 W. R., 198; nor was notice of the process on the debtor necessary—*Shum oo Chunder Holdar* vs. *Ram Lal Ghose*, 13 W. R., 436; for the law. But mere notice of execution is not a process, and is insufficient—*Poorno Chunder Coondoo* vs. *Prosonno Coomar Sikdar*, I. L. R., 2 Cal., 123, presumes that he must know of it—*Boro Khosiah* vs. *Jata Sirdar*, 15 W. R., 315.

Before a Judge can enter into an enquiry whether notice has or has not been served on the applicant in the first instance, when the suit was commenced, he must first determine if the application for re-hearing has been made in proper time—In the matter of *Peary Mohun Dutt*, 11 W. R., 310.

The limit is within 30 days from the process for enforcing judgment, and this means process against the person or property of the judgment-debtor; and if the process is not personal, time does not begin to run until his property has been affected. So a judgment-debtor is not debarred from coming in more than 30 days after attachment, provided he shows the property attached is not his—*Shib Chunder Bhadooree* vs. *Lukhee Debia Chowdhrain*, 6 W. R., Mis., 51; *Sookh Moyee Dassee* vs. *Nurnooda Dassee*, 15 W. R., 210; *Radha Benode Chowdhry* vs. *Degamburree Dossee*, B. L. R. (F. B.) Sup., vol., 947; but nothing less than this amount of proof will suffice. Where defendant petitioned that he had been obliged to leave his village and settle in a place 24 miles distant, and that he was not in possession of the lands against which the process issued, the petition was rejected—*Kalee Proshad*, vs. *Digambar Chatterjee*, 25 W. R., 72.

Under section 119, Act VIII of 1859 an order setting aside a judgment was final, and under the present procedure no appeal is allowed. This means an order passed within jurisdiction, under the conditions specified by law; if it be otherwise, as if it were passed on an application made after 30 days, the Court exercised a jurisdiction it did not possess, and, though no appeal would lie, the order could be set aside on motion under the Charter—*Luckhee Monee Dassee* vs. *Bhubun Mohun Bose*, 23 W. R., 147; or on application in the nature of a review to the Judge who passed the order—*Sheo Prosunno Singh* vs. *Buldharee Lall*, 23 W. R., 232. See also *Mahomed Azeemoollah* vs. *Ali Buksh*, 5 Alla., 74.

And though a proper order is so far final that it is not open to appeal, its propriety may be contested in appeal from the final decree. Thus, where an application for re-hearing was admitted after 30 days, all proceedings subsequent to the order of admission were set aside in appeal from the final decree—*Rung Lall Misser* vs. *Tokhan Misser*, 25 W. R., 304; *Bimola Soonduree Dossee* vs. *Kalee Kishen Mojoomdar*, 22 W. R., 5; but in another case three Judges seemed to look upon such an order as not affecting jurisdiction, but as a mere irregularity, such as the admission of evidence in appeal without recording the reason, and to hold that the Courts are bound to decide on the whole evidence in the cause—*Boro Khosiah* vs. *Jata Sirdar*, 15 W. R., 315; 8 B. L. R., 78. And therefore it was held that, if the objection is not raised in the first Appellate Court, it is too late to raise it in appeal (*id.*); and where one of several defendants got the case re-opened, and another who did not appear in time was allowed the benefit of the dismissal which ensued, it was held that the Appellate Court was wrong in setting aside the judgment of the Lower Court, as regards the latter defendant, on the ground that he had not appeared in time—*Koroona Moyee Debia* vs. *Nubo Kishen Mookerjee*, 11 W. R., 18.

Effect of Revival.—An application by one co-defendant re-opens the case against all the defendants where the objection is a ground common to all; otherwise, not—*Nistarinee Dossee* vs. *Debnath Bose*, 20 W. R., 286; *Dookhee Khan* vs. *Rajessuree Ranee*, 15 W. R., 371, and the Court has no power to impose terms—*The Administrator-General of Bengal* vs. *Lalla Dyaram Dass*, 6 B. L. R., 688; *Goluckhor* vs. *Bishonath Geere*, Marsh., 32. In a suit for rent against A, B and C, which was decided *ex-parte*, C applied under Act X of 1859 for a review, and proved that he had no connection with the property; the decree remained in force against A and B—*Doorga Persaud Ghose* vs. *Greesh Chunder Bose*, 1 W. R., 222. And so, where B and C were held liable as principal and surety, and the latter applying for a re-hearing, the case was set down and ultimately dismissed on default by non-attendance of both parties, the decree continued against B, but not against C—*Gudhadhur Chatterjee* vs. *Nund Lall Mookerjee*, 12 W. R., 406.

When an *ex-parte* decree is set aside by admitting a review, all processes issued in execution under the decree are also set aside. Thus, A obtained a decree *ex-parte* against B, and attached his property. Afterwards B sold it to C, and then applied for and obtained an order for re-hearing under this section; it was held that the sale was not void, and the effect of the revival was to declare that there had not been up to that time a *valid* decree in the suit—*Lalla Jagat Narayan* vs. *Tulsiram*, 1 B. L. R., 71. It is difficult to support this decision in its entirety; for if B had not petitioned, the decision would have been final. And in a case in which A obtained an *ex-parte* decree against R and others, and in execution sold R's interest in certain landed property, and R succeeded in reviving the suit, it was held that the sale could not be set aside as void—*Gowree Boyjo Nath Pershad* vs. *Jodha Singh*, 19 W. R., 416, which would seem to show that the decree was not invalid.

Defendant applied under section 119, Act VIII of 1859, and his application was rejected. He appealed, the suit was remanded, and the first Court admitted the application. Plaintiff then appealed, the order was reversed, and both parties went back to the Munsif, who recorded that his original order should stand. In the meantime the second order of the Appellate Court was set aside in special appeal. It was held, the effect of this decision was to set aside all the proceedings subsequent to the order appealed against, and to confirm the order of the first Court admitting the review—*Nubo Kristo Mookerjee* vs. *Nadiar Chand Hattee*, 12 W. R., 374.

Practice.—The Court remains the same, though the presiding officers be changed, and a Judge can revive a suit tried by his predecessor—*Rughoo Mohinee Dossee* vs. *Kashee Nath Roy Chowdhry*, 10 W. R., 156.

When a case is restored the Court should allow the plaintiff to recall his witnesses or to call other witnesses, and to permit the defendant to cross-examine them, for evidence taken in the absence of the defendant cannot be used against him—*Ram Buksh Lal* vs. *Kishoree Mohun Shaha*, 12 W. R., 130; though it is doubtful if all the expenses of obtaining and serving fresh summonses on the witnesses should be thrown on the plaintiff—*Bishen Perkash Singh* vs. *Ruttun Geer Chela*, 20 W. R., 3.

In an appeal from an order of rejection under section 119, Act VIII of 1859, the appellant tendered an affidavit, explaining their conduct in the Lower Court, as evidence under section 355, Act VIII of 1859, but it was rejected—*Leslie* vs. *Allender*, 17 W. R., 390.

Section 103, Act VIII, 1869 (B. C.), does not apply to this section, but only to ordinary reviews—*Durpo Monee Guptea* vs. *Tara Churn Sein*, 16 W. R., 71.

CHAPTER VIII.

OF WRITTEN STATEMENTS AND SET-OFF.

Written statements.

110. The parties may, at any time before or at the first hearing of the suit, tender written statements of their respective cases, and the Court shall receive such statements and place them on the record.

This section applies to H. C.

Parties.—A third party will not be allowed to file a statement for a plaintiff or defendant who has neglected to do so himself—*Sreemutty Denomoye Dassee* vs. *Tara Churn Coondoo*, Bourke, 153: on the other hand, if the parties are present in person or by pleader, the mere fact that defendant has not filed a written statement does not warrant trying the suit *ex-parte*—*Sivarajadhani Pillai* vs. *Kuppa Gantalu Pantulu*, 2 Mad., 311.

Written statements need not be stamped—*Nagu* vs. *Yeknath*, I. L. R., 5 Bom., 400. They should not be received after the first hearing (which should be fixed so as to give the parties due and reasonable time to prepare them)—*Lokhenath Thakoor* vs. *Sobanath Misser*, 5 W. R., Act X, 39), except under the circumstances described in sections 111 and 112, and in answer to written statements required by the Court.

Under the old procedure the words were "at the first hearing of the suit," and it was held that the admission of written statements on several dates was wrong—*Mirza Ali Nahee* vs. *Mirza Torab Ali*, W. R., 1864, p. 44.

In a suit for wrongful dismissal if a defendant wishes to give evidence of a specific transaction in justification for dismissing the plaintiff, which he becomes aware of after he has filed his written statement, he should (before first hearing,) file a supplementary written statement setting it forth—*Munchershaw Brjonji* vs. *The New Dhurmsly, S. and W. Co.*, I. L. R., 4 Bom., 576.

Particulars of set-off to be given in written statement.

111. If in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set-off.

Inquiry.

The Court shall thereupon inquire into the same, and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set-off does not exceed the pecuniary limits of its jurisdiction, the Court shall set-off the one debt against the other.

Effect of set-off.

Such set-off shall have the same effect as a plaint in a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but it shall

not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Illustrations.

(*a*) A bequeaths Rs. 2,000 to B, and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D. Then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(*b*) A dies intestate and in debt to B. C takes out administration to A's effects, and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters—one as the vendor to B, in which he sues B, and the other as representative to A.

(*c*) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods, and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(*d*) A sues B on a bill of exchange for Rs 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set-off.

(*e*) A sues B for compensation on account of a trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands.

(*f*) A and B sue C for Rs. 1,000. C cannot set-off a debt due to him by A alone.

(*g*) A sues B and C for Rs. 1,000. B cannot set-off a debt due to him alone by A.

(*h*) A owes the partnership firm of B and C Rs. 1,000. B dies leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

This section applies to H. C. and M. S. C. C.

Set-off, at law, is founded on Statute, and to prevent cross-actions. It was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which were already enforceable in an action; and it has always been accordingly held, that a set-off can only be successfully pleaded when an action could have been maintained for the same debt—*Rawley* vs. *Rawley*, I. Q. B. D., 460.

A claim to set-off a cross demand should not be confounded with a plea of payment. A sued B for arrears of rent. B stated that his tenure had been managed for some time by the Collector who in addition to other demands had realised the rent. It was held a plea of payment and not of set-off—*Koonjo Behary Sing* vs. *Nilmoney Singh*, 4 C., L. R., 296.

The Madras High Court, in referring to the corresponding sections of Act VIII, 1859, said—"These are provisions of a Code regulating procedure only, and whilst we think that the language used has not the effect of enlarging the right of set-off, we ought at the same time to say that, according to our present opinion, the Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which parties would have independently of its provisions. It seems to us that the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit—*Clark* vs. *Ruthnavaloo Chetti*, 2 Mad., 296; followed in *Gauri Sahai* vs. *Ram Sahai*, 7 Alla., 157; *Kishor Chand Champalal vs. Madhuwji Vissam*, I. L. R., 4 Bom., 407. And on this principle it was held in a suit on a contract that the defendants were entitled to set-off the amount of damages which they had proved to have suffered by reason of the plaintiff's breach of the contract sued on, where such was the *intention* of the parties—*Kistnasamy Pillay* vs. *Municipal Commissioners for Madras*, 4 Mad., 120. And so it has been held that where the right of set-off arises out of one and the same transaction, it would not be equitable to drive a party to a regular suit where the claim could be dealt with in execution of a decree—*Radha Ram Deb* vs. *James*, 20 W. R., 410. See also, on equitable set-off, *Middleton* vs. *Pollock*, L. R., 20 Eq., 515; *Vulliamy* vs. *Noble*, 3 Mer., 593; *Ex-parte Stephens*, 11 Ves., 24; *Ex-parte Blaquire*, 19 Ves., 464; *Ex-parte Toogood*, 11 Ves., 516; *Aldis* vs. *Knight*, 2 Mer, 121; *Lord Lanesborough* vs. *Jones*, 1 P. Wms., 326; *Ex-parte Flint*, 1 Sim., 33; and as to mutual credit, see *Young* vs. *Bank of Bengal*, 1 Moore, 87; *Ex-parte Morier*, 12 Ch. Div., 491, *In re Whitehouse*, 9 Ch. Div., 597; *Prat* vs. *Jones*, 8 Q. B. Div., 147; *Narrandas Hemraj* vs. *Vissandass Hemraj*, I. L. R., 6 Bom., 134; *Hajee Syed Mahomed* vs. *Ashrupoonnissa*, I. L. R., 5 Cal., 759; *Miller* vs. *Beer*, 6 C. L. R. 294; *Bhoirob Chunder Dass* vs. *Haffizunissa Khatown*, 2 C. L. R., 414; *Rhushalo* vs. *Behari Lal*, I. L. R., 3 Alla., 523

In a suit for account by a mortgagor against a mortgagee in possession under a *Zurpeshgi lease*, the rents unpaid by the mortgagee though barred by limitation were set-off against the mortgage debt—*Nursingh Narain Singh* vs. *Baboo Lukputty Singh*, I. L. R., 5 Cal., 333.

Suit.—Under Act VIII, 1859, the suit must have been for a debt—*Roti Rumun Oopadhya* vs. *Grieja Nund Oopadhya*, 5 W. R., 160; it is not so under the present law. See *Illustration* (*e*.)

The same character.—In a suit by a Hindu widow for a debt, the defendant can set-off a debt due to her deceased husband—*Watson & Co.* vs. *Brojo Soondaree Debia*, 16 W. R., 224; *Grish Chunder Lahoury* vs. *Koomaree Debia*, 1 W. R., Mis., 23. Purchasers and assignees with notice represent their vendors and assignors. Thus where A by a deed of *Zurpeshgi* lets certain lands to B to secure a debt, and B covenanted to pay a certain sum annually; on failure by B, A obtained a decree for the amount due. Subsequently C, in execution of a decree, bought B's interest in the sum lent, and sued A to recover the same. *Held*, A was entitled to set-off his decree against C—*Bhagawani Kunwar* vs. *Lala Baijnath Prasad*, 2 B. L. R., 84.

A took a loan from C under a bond pledging the shares of himself, his minor brother and cousin, and covenanting that the interest should be credited to the rent of the shares pledged, let in farm to C. In a suit for rent by A and the others C pleaded a set-off of the interest. The Court found the bond proved as against A only and allowed a set-off as regards him, but not as regards the others—*Futteh Narain* vs. *Deen Dyal Lall*, 15 W. R., 37. But A cannot set-off against a claim made by B in respect of separate dealings between him and A, a debt due from a firm consisting of a father and two sons, one of whom is B—*Dhunpat Singh* vs *Forbes*, 1 Ind. Jur., N. S., 354; unless B was the sole beneficial owner of the assets of the firm and could compel his father and brother to transfer them into his name alone—*Ex-parte Morier*, 12 Ch. Div., 491; and in action against A for money, he cannot set-off his share of a debt due him and others—*Bowyear* vs. *Pawson*, 6 Q. B. Div., 540.

A contributory cannot set-off a debt due to him from the company against calls made in winding up—*In re Whitehouse*, 9 Ch. Div., 595; *In re General Works Company*, 12 Ch. Div., 755. See also Seton, p. 782 *et seq.*

Ascertained Sums.—Setting-off one unascertained sum against another cannot be made the basis of a decree—*Mussamut Bebee Bachun* vs. *Shaikh Hamid Hossein*, 17 W. R., 113. The sum sought to be set-off must be a sum certain, not damages undetermined—*Rai Gobind Singh* vs. *Soonder Pal*, 3 Agra, 177; something in the nature of a debt, see paragraph 2 of this section, *supra*. In a suit for arrears of rent, defendant can set-off a cross demand for an ascertained amount due under a bond—*Watson & Co.* vs. *Brojo Soonduree Debia*, 16 W. R., 224; but not a claim for contribution, the amount of which remains to be determined—*Hoseince Bebee* vs. *Smith*, 22 W. R., 15; nor for costs not awarded—*Huro Pershad Chowdhry* vs. *Fool Kishoree Dossee*, 16 W. R., 308. In a suit on bills of exchange, a set-off arising from a claim to damages sustained by reason of the plaintiff's failing to insure goods unconnected with the hoondees was not allowed—*Clark* vs. *Ruthnavaloo*, 2 Mad., 296; nor even a claim for damages by reason of the goods pledged to secure the bills having been sold in violation of an agreement between the parties—*Ram Dyal* vs. *Ram Dhun Dass*, 4 Agra, 43; nor in a suit for money lent on a usufructuary mortgage will a claim for damages on account of waste of the mortgaged property be allowed—*Rayu Nath Das* vs. *Ashraf Hossein Khan*, 2 Alla., 252. In a suit for money claimed on account of the carriage of goods, a set-off on account of damage caused to the goods was not allowed—*Scanlan* vs. *Herrold*, 10 W. R., 295; in a suit on an arbitration award defendant pleaded a set-off on account of certain debts, payable jointly according to the award, which he had paid; it was held that a set-off was admissible, but the Court must enquire into each disputed item of the demand—*Gauri Sahai* vs. *Ram Sahai*, 7 Alla., 157; but otherwise where the claim was not for debts ascertained, but for the balance of a separate account as yet undetermined—*Kali Koomar Chuckerbutty* vs. *Hurro Chunder Chuckerbutty*, 17 W. R., 177. In this last case some stress seems to have been laid on the fact that the claims were altogether of another nature; but, looking at illustration (*e*), that by itself would hardly be a valid objection under this Code.

Plaintiff, one of several co-sharers, sued a lessee of a portion of an estate for his share of the rent; the claim was admitted. But the defendant pleaded as a set-off that he had paid money on account of the plaintiff's share of arrears of the Government revenue for the same period. *Held*, that this was not admissible as a set-off under section 121 of the Code, but was the subject of a separate suit on which other sharers should be joined. It was never the intention of section 121 that two suits entirely different in character should be tried together—*Hosein Beebee* vs. *James Smith*, 22 W. R., 15; 13 B. L. R., 440. The Code seems to give the Courts no discretion to refuse such a demand.

The sum must be legally recoverable A defendant cannot claim to set-off a sum expended in repairing a house without authority—*Mussamut Jumeerunnissa* vs. *Gayer*, 6 W. R., Ref., 26; or in respect of a demand already dismissed—*Abdoollah Khan* vs *Sreekunto Pershad Hajrah*, 15 W. R., 252; or barred by limitation—*Heeralal* vs. *Bishen Suhaye*, 2 W. R., 296; or an infant's debt—*Rawley* vs. *Rawley*, 12 B. Div., 461; or based on a decree incapable of being enforced—*Huro Pershad Roy* vs. *Fool Kishoree Dossee*, 16 W. R., 308; nor can the same amount be set-off in two separate suits—*Shah Gholam Gous* vs. *Shah Furreed Alam*, S. D., N. W., 1864, p. 276

The nature of the set-off, and the amount of it, must be within the cognizance of the Court—*Ram Lal* vs. *Lancaster*, 3 Alla., 114; *Heeralal* vs. *Bishen Suhaye*, 1 W. R., 26.

By sections 89, 90 of the Judicature Act, 1873, a Court of limited jurisdiction can entertain a claim by way of counter-claim although it is in respect of matters which arise beyond its local jurisdiction and which could not be put forward in an original action—*Davies* vs. *Flag Staff Silver Co.*, 3 C. P. Div., 228. No such power is given under this Code. But it is no defence to a claim of set-off that it will not amount to the plaintiff's claim—*Mostyn* vs. *West Mostyn Co.*, 1 C. P. Div., 496; or that the claim did not arise before the date of the plaint—*Ellis* vs. *Manson*, 35 L. J., 586; but see 5 Ch., Div., 713; and apparently when the claim is joint, defendant may set up claims (separate) of set-off against each plaintiff—*The Manchester Company* vs. *Brooks*, 2 Ex. Div., 243.

Effect of set-off—The claim is to be treated as a cross-suit. Thus a defendant may deny plaintiff's claim, plead a set-off, and get a decree for it, though no sum has been found due to the plaintiff—*Hayat Kha* vs. *Abdula Kha*, 6 Bom., 151; but see *Huro Soondurce Dossee* vs. *Bungshee Mohun*, 5 W. R., Mis., 32. And the appeal will lie to the same Court as if the sum had been demanded in a separate suit (section 216)—*Ram Lal* vs. *Lancaster*, 8 Alla., 114; over-ruling *Mussamut Masooma Beebee* vs. *Mussamut Nuzar Fatma*, 1 Alla., 203. The final judgment should determine both the original and the cross-claim; but the decree shall only be for the recovery of the balance—section 216, *post*; 4, C. P. Div., 72. Difference between plea of payment and set-off—see *Koonjo Behary Singh* vs. *Rajah Nilmoney Singh*, 4 C. L. R., 296.

Attorney's Lien.—Plaintiff in a resumption suit, is entitled to set-off the amount of his taxed costs against the mortgage money (notwithstanding any claim which the defendant's attorney may have against the defendant in respect of the costs of the suit—*Brijnath Dass* vs. *Juggernath Dass*, I. L. R., 4 Cal., 742; and the general rule is that the right of set-off is not affected by the solicitor's ordinary lien for costs—*Pringle* vs. *Gloag*, 10 Ch. Div., 676.

Where a solicitor is discharged by his client he holds papers entrusted to him subject to his lien for costs and he has the same lien upon translations made by the Court interpreter (at the solicitor's expense) as upon other documents, and he will not be compelled to produce them—*Rai Kesserbai* vs. *Nananji Walji*, I. L. R., 4 Bom., 353.

Execution of decree.—As to set-off of decree against purchase-money—See *Gopal Singh* vs. *Roy Behari Lall Sahoo*, 5 C. L. R., 181.

No written statement to be received after first hearing.

112. Except as provided in the last preceding section, no written statement shall be received after the first hearing of the suit:

Provisoes.

Provided that the Court may at any time require a written statement, or additional written statement, from any of the parties, and fix a time for presenting the same:

Provided also that a written statement, or an additional written statement, may, with the permission of the Court, be received at any time for the purpose of answering written statements so required and presented.

This section applies to H. C.

At any time.—The words of Act VIII, 1859, section 123, were "any time *before final judgment*," and these were held to mean that written statements could be called for only by the first Court and before judgment—*Jugessur Mookerjee* vs. *Gopi Kishen Sein*, 5 W. R., 50. But unless they are called for by the Court or filed under section 111, they cannot be received after first hearing—*Huza Ali Nuckee* vs. *Mirza Emdad Ali*, W. R., 1864, 44.

Court may require.—The practice in the Calcutta High Court is, when one of the parties neglects to file a written statement, to examine him as to the grounds of his defence and confine him to that statement unless a written statement seems desirable, when the case will be adjourned for that purpose at his expense—*Ramrutton* vs. *The Oriental Steam Nav. Co.*, 2 Hyde, 89.

The word "require" does not prevent a Court from allowing an additional written statement being filed on motion made. In the case of *Sreemutty Dasimani Dasee vs. Srinath Ghose*, 8 B. L. R., App., 11, two objections were raised—(1) it was not called for by the Court, and (2) it was inconsistent with the original written statement. The Court admitted it on payment of the costs of the application, at the same time intimating that such an additional statement would not have been accepted from the plaintiff. But now that this section will apply to the High Court, it is doubtful if such a statement could be accepted. The power to receive as opposed to the right to demand as clearly limited to the last paragraph.

A Court should not require a written statement inconsistent with the plaint, but it is justified in calling for one, not with the object of adding to or varying plaintiff's claim, but to supply omissions in the plaint—*Jahangeer Buksh* vs. *Bhikaree Lall*, 11 W. R., 71; and where a plaintiff claimed land under an amicable arrangement subsequent to a deed of sale, and the defendant denied the sale and the arrangement, an additional statement was taken with the deed of sale, as plaintiff asserted he could not anticipate that the defendant would deny his right altogether—*Lall Mahomed* vs. *Dhoolee Ram Doss*, 22 W. R., 277.

The mere irregularity of the Court calling for a written statement without any sufficient cause is not a good ground of special appeal; the appellant must also be prejudiced thereby—*Lall Mahomed* vs. *Dhoolee Ram Doss*, 22 W. R., 377.

Procedure when party fails to present written statement called for by Court.

113 If any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pass a decree against him, or make such order in relation to the suit as it thinks fit.

This section applies to H. C.

Where the defendants, after ample opportunity, neglected to put in a written statement, the Court, per Peterson, J., stated that in future he should put the defendant into the box and examine him as to the grounds of his defence; and if on examination it should appear that a written statement is desirable, the case would be adjourned for that purpose at the expense of the defaulting party—*Ramrutton Dass* vs. *The Oriental Inland Steam Navigation Co.*, 2 Hyde, 89. Defendant remained in Calcutta one month after it was ordered he should put in a written statement and then went on a pilgrimage. His son applied for leave to file a written statement, and his application was refused as no cause was shewn why his father had not filed it before he left Calcutta—*Sree Mutty Denomoye Dossee* vs. *Harachurn Coondoo*, 1 Bourke, 153.

Frame of written statements.

114. Written statements shall be as brief as the nature of the case admits, and shall not be argumentative, but shall be confined as much as possible to a simple narrative of the facts which the party by whom or on whose behalf the written statement is made believes to be material to the case, and which he either admits or believes he will be able to prove.

Every such statement shall be divided into paragraphs, numbered consecutively, and each paragraph containing as nearly as may be a separate allegation.

This section applies to H. C.

The written statement affords the first means of correcting, or adding to the plaint, so as to make the nature of the action clear. If a plaint has been informally verified, the case may proceed on the written statement if it contain the allegations in the plaint—*Manooram Shaw* vs. *Hurrypershad Roy*, Bourke, 162.

A written statement is not in the nature of a pleading, and should not be written after inspecting that of the opposite party, nor by way of rejoinder to it—*Jadub Ram Deb* vs. *Ram Lochun Muduq*, 5 W. R., 56; *Jahirooddeen* vs. *Nasirooddeen*, 3 Wy., 265. It should contain nothing more than a *bonâ fide* statement of the facts of the case—*Kasub Lall Dey* vs. *Tremearne*, 3 B. L. R., App., 12. Anything in the shape of argument or evidence or conclusions of law to be drawn from the facts pleaded is inadmissible—*Williamson* vs. *London and N. W. Ry. Co.*, 12 Ch. Div., 787. In a suit to set aside a deed of sale as false, it was stated among other things: "It appears from a copy of the fraudulent and fabricated deed of sale that the defendant No. 1 has made the plaintiffs declare in it the fact that out of the consideration-money amounting to Rs. 6,500, the putowa (or mortgage) money due to H. and Co., amounting to Rs. 548-4, is kept in deposit, and Rs. 5,951-12 were received in cash to meet the demand of Mussamut Anarkoli Koer, and defray other necessary expenses; but this clause is the result of the foulest devise. If the putowa-money, Rs. 548-4, due to H., were payable out of the usufruct of putowa property, then what was the use in selling the property? It would be absurd to suppose that any one would sell his estate to satisfy by putowa-debt. As for the debt due to Mussamut Anarkoli Koer, it was paid by the plaintiffs out of their own money: the said clause in the deed of sale is the result of the foulest de-

vice, and has been introduced into it, to carry out a fradulent design." All this should have been struck out—*Bishen Sahaya Sing* vs. *Beer Kishore Singh*, 8. W. R., 296. See this case for other examples of bad pleading.

The object of written statements being to find out the real points in dispute between the parties, and thus prevent fabrication of false evidence, or the unnecessary production of evidence, they should be framed with the greatest care and deliberation so as to dispense with parol statements at the settlement of issues—*Anund Chunder Banerjee* vs. *Woomess Chunder Roy*, 1 Hyde, 147; the narrative should be complete. In the case of *Sreenauth Mullick* vs. *Brijolall Pyne* and *Doorgaprasad Seal*, 1 Hyde, 33, plaintiff sued on a promissory note. In cross-examination of the principal witness for the plaintiff it came out that defendant had signed a receipt as well as a promissory note. No mention of this had been made in the written statement. In his judgment, Wells, J., said :—" Though an important document, no mention is made of it in the written statement.....A written statement under Act VIII, 1859, is required to set forth a full and true narrative of the facts of the case, and a party cannot be allowed any discretion as to whether he will state or withhold a fact of such importance as the execution of a receipt for the money sued for." See note under section 147.

Evidence.—A written statement cannot be read against any party save him by whom it has been made or those who are bound by his admissions—*Joggessur Mookerjee* vs. *Gopee Kishen Sein*, 5 W. R., 50. In a suit for possession of land the written statement of one co-sharer cannot be used against the others—*Mookta Keshee Dassee* vs. *Koylash Chunder Mitter*, 7 W. R., 493; *Ijjutoollah Khan* vs. *Ram Churn Gangoolee*, 12 W. R., 39. Even as against the party making it, it is not looked upon as a plea by way of confession and avoidance of which the opposite party can take advantage as regards the admission, leaving him to prove the remainder. It is like an answer in Chancery, and if put in evidence the whole must be read together, though the Court need not believe the whole of it—*Poolin Beharee Sein* vs. *Watson & Co.*, 9 W. R., 190. See, however, *Brijokishore* vs. *Bishonath Dutt*, W. R., 1864, p. 305. In a suit for enhancement of rent the defendant admitted that the productiveness of the land had increased, but not otherwise than by his own agency; it was held that, as the statement was qualified, the first portion of it could not be used without the qualification for the purpose of throwing the proof of the latter portion on the defendant (*id.*); overruling *Nobin Kishen Bose* vs. *Shofatoolah*, 1 W. R., 24. So where plaintiff sued to set aside a kherajee bromutur tenure, and the defendant admitted he held as tenant at a yearly quit-rent, it was held that the statement must be taken with the qualification, and that the plaintiff could not use the statement as an admission that the defendant held as tenant, and throw on him the onus of proving that he held at a yearly rent, although the Court was not bound to believe the whole of the statement—*Nilmoney Singh Deo* vs. *Ramanoograh Roy*, 7 W. R., 29. The rule in short is this, that where a statement is made subject to a qualification, the whole must be put in evidence; and the Court may attach to it or any portion of it as much value as it deems fit—*Radha Churn Chowdhry* vs. *Chunder Monee Shikdar*, 9 W. R., 290.

But if a party makes a series of independent and unqualified statements, they may be used against him; the rule above mentioned as regards qualified statements goes no further than to lay down that an unfair use cannot be made of a man's statement by trying to convert into an admission by him what he never intended to be an admission. In a suit for land the defendant made two distinct assertions—(1) that the plaintiff's ancestor was in possession up to a certain date, and (2) that at that date he relinquished the lands, and they were settled with the defendant; the first was taken as an admission against the defendant, but he was called on to prove the second—*Baikanthanath Kamar* vs. *Chandra Mohan Chowdhry*, 1 B. L. R., 133. And in a suit on a bond containing a recital of payment, if the defendant admits execution but denies payment, the onus to prove the latter lies on him—*Maniklall Baboo* vs. *Ramdas Mosumdar*, 1 B. L. R., 92. A defendant cannot treat a written statement as evidence in his own favour. This was attempted in *Shaik Shufurar Mollah* vs. *Shaikh Dhunnoo*, 16 W. R., 257. Ainslie, J., said:—" Under that Act (VIII of 1859) it is the duty of the Court to examine the written statements in order to see on what points the parties are at issue, and to lay down the issues, and to receive and consider the evidence adduced on the points in dispute; but the Court will not allow the parties to waste its time by producing evidence to establish that which has never been contradicted; and therefore to lay down that, when a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is entitled to say that the plaintiff has relied on his statement as evidence, and that he (defendant) is in consequence in a position to claim that the whole of it may be read as evidence in his own favour, is a proposition

that cannot be maintained." Subject to the distinction referred to in the cases above, which were not cited, this seems a very clear exposition of the doctrine.

By sections 23 and 34 of the Patent Act, no evidence shall be admitted at a trial for infringing a patent in regard to the validity of the patentee's exclusive privilege, unless on the particular grounds set forth in written statements of the parties—*Sheen* vs. *Johnson*, I. L. R., 2 Alla., 368. And in a case of wrongful dismissal defendant was not allowed to go into evidence of a specific transaction as an instance of misconduct on the part of the plaintiff, not set forth in his written statement, but which he became aware of before first hearing. It was held that he should have filed a supplemental written statement—*Hunchershaw Bejonji* vs. *The New Dhurmsly, S. and W. Co.*, I. L. R., 4 Bom., 576.

Written statements to be signed and verified.

115. Written statements shall be signed and verified in the manner hereinbefore provided for signing and verifying plaints, and no written statement shall be received unless it be so signed and verified.

This section applies to H. C.

Persons exempted from attendance in the Civil Courts are not exempted from subscribing and verifying their written statements, except for good cause, and even then care should be taken that the party verifying has a knowledge of the case, and is not an ignorant servant who can have no acquaintance with the facts he pretends to verify—*Kinoosing Roy* vs. *Eshan Chunder Roy*, 2 Wym., 253.

When an application is made that a written statement be verified by an attorney of a party, it is desirable, but not absolutely necessary, that notice should have been given to the other side—*Finlay, Campbell & Co.* vs. *Steele*, 1 Ind. Jur., N. S., 39. It is very doubtful if an attorney, as such, can verify written statements under the Code.

If an unverified statement is admitted on the record without objection, the allegations contained in it should be noticed and issues framed accordingly—*Radha Churn Roy* vs. *Moran and Co.*, 13 W. R., 342.

Power of Court as to argumentative, prolix, or irrelevant written statements.

116. If it appears to the Court that any written statement, whether called for by the Court or spontaneously tendered, is argumentative or prolix, or contains matter irrelevant to the suit, the Court may amend it then and there, or may, by an order to be endorsed thereon, reject the same, or return it to the party by whom it was made for amendment within a time to be fixed by the Court, imposing such terms as to costs or otherwise as the Court thinks fit.

Attestation of amendments.

When any amendment is made under this section, the Judge shall attest it by his signature.

Effect of rejection.

When a statement has been rejected under this section, the party making it shall not present another written statement, unless it be expressly called for or allowed by the Court.

This section applies to H. C.

The practice in the High Court is to make an application to have the statement taken off the file on the ground that it is malicious, argumentative, or irrelevant; and if the applicant succeeds the order is that the written statement be taken off the file with leave to file a new written statement within a given time, usually a week, and the unsuccessful party pay the costs of the application—*Kasub Lal Dey* vs. *Tremearne*, 3 B. L. R., App., 12; an order fining the pleader one rupee who filed the written statement, and directing a large portion of it to be struck out, is bad—*Boolee Singh* vs. *Hurobuns Narain Singh*, 7 W. R., 212.

Applications to take the statement off the file should be made as soon as possible after the written statement has been filed. In the High Court on its original side if a written state-

ment has been four clear days upon the file in compliance with Rule 28, it cannot be taken off when the suit is ripe for hearing—*Smallwood* vs. *Parry*, 1 Coryton, 39; referring to *Nawab Nazim of Bengal* vs. *Rajah Prosononarain Deb*, *Hurkaru*, 7th of May 1864; and *Ranee Roshan Jehan* vs. *Syed Mayat Hossein*, 1 Marsh., 127. And if evidence has been taken, the applicant would be bound to shew that he had been in some way prejudiced—*Lall Mahomed* vs. *Dholee Ram Dass*, 22 W. R., 377.

In Bombay the rule is that a Court has power to take a written statement off the file, for irrelevancy, until it is produced at the hearing of the suit. The filing of a written statement does not necessarily make it a part of the record but is merely for the purpose of notice to the plaintiff of the nature of the defence—*Keshavji Naik* vs. *Nasarvanji*, 10 Bom., 425.

As to cases in which written statements were rejected, see note on section 114, *ante*.

CHAPTER IX.

OF THE EXAMINATION OF THE PARTIES BY THE COURT.

Ascertainment whether allegations in plaint and written statements are admitted or denied.

117. At the first hearing of the suit, the Court shall ascertain from the defendant or his pleader whether he admits or denies the allegations of fact made in the plaint, and shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

This section applies to H. C. and M. S. C. C.

Oral examinations of party, or companion of himself or his pleader.

118. At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court: and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

This section applies to H. C. and M. S. C. C.

Appearing.—This section contemplates the case where a party has appeared in proper time. Thus, where defendants were summoned to appear and they did not, but put forward excuses for their non-attendance which were deemed insufficient, and on a subsequent day the suit was decided *ex-parte*, although their pleaders were present, it was held that the decision was right—*Joy Prokash Singh* vs. *Mekraj Singh*, 12 W. R., 207; on the other hand, if the parties appear properly, it is the duty of the Court to examine them, and frame the issues: not putting in a written statement does not justify the trial of a suit *ex-parte*—*Sivarajadhani Nila Kemthain Pillay* vs. *Kuppuguatuleen*, *Ramiah Pantulee*, 2 Mad., 311. As to *ex-parte*, see note to section 100. The parties have no right to put questions to each other.

Substance of examination to be written.

119. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

This section does not apply to H. C. or M. S. C. C.

The words in section 125, Act VIII of 1859, "such examination shall (unless the pleader be the person examined) be upon oath or affirmation or otherwise according to the provisions of the law for the time being in force relating to the examination of witnesses," have been omitted, so that the examination would appear to be capable of being made without any oath or affirmation.

Consequence of refusal or inability of pleader to answer.

120. If the pleader of any party who appears by a pleader refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day, and direct that such party shall appear in person on such day.

If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pass a decree against him, or make such order in relation to the suit as it thinks fit.

This section applies to H. C. and M. S. C. C.

Material.—Before acting under this section the Judge should be satisfied that the question is material—*Gopal Chundra Hazrah* vs. *Mohesh Chunder Banerjee*, 21 W. R., 44; and he should record the grounds of his satisfaction and the question asked—*Baboo Makoond Adit* vs. *Rajah Suttoor Ghun Adit*, 17 W. R., 507. Where a case was dismissed under section 126 of Act VIII, 1859, the decision was set aside, as there was nothing on the record to shew that the party "refused to answer any material question"—*Kishnaji A. Neinkar* vs. *Kishnu A. Ninkar*, 2 Bom., 340.

Lawful Excuse.—Whether an excuse is lawful or not will depend on the nature of the particular case—*Baboo Durga Dutt Singh* vs. *Jheengoor Jha*, 18 W. R., 63; and before passing a decree against a person for non-attendance, the Judge should hear what he has to say, and adjudicate on the sufficiency of the excuse—*Moulvee Mahomed Hamidoolla* vs. *Durbesh Shaik*, 24 W. R., 314; *Bhally Mahomed Bukshee* vs. *Nobin Chunder Roy*, 15 W. R., 269.

It is a lawful excuse if the party objects on the ground that he lives beyond the limits mentioned in section 170—*Shaikh Gholam Bakshee* vs. *Pullin Singh*, 3 W. R., Act X, 162; or is exempted under this Code—*Juggud Indur Banwari* vs. *Soorjo Coomar Chowdhry*, Marsh., 627; or has not had sufficient time to appear—*Khadav Bhi* vs. *Raheman Bhi*, 3 Mad., 167; or was of necessity absent on Government service on the date fixed—*Cowell* vs. *Ishen Chunder Sein*, 18 W. R., 17. But where plaintiff's mookhtear was unable to answer certain questions necessary for fixing the proper issues, and the plaintiff, who was exempt from attendance in the Civil Court, was called on to appear or send some one who could answer, and he did neither—*Nilmonee Sinoh Deo* vs. *Ram Huree Misser*, 2 W. R., 161; or he promised to appear, but did not, and gave no reasons why he could not—*Doorga Dutt Singh* vs. *Jheengoor Jha*, 18 W. R., 63; or refused to appear on social grounds, namely, that persons of his position had a prejudice against appearing in Court—*Kalee Chunder Chowdhry* vs. *Ranee Surut Soonduree*, 18 W. R., 45; *Rajah Nursing Deb* vs. *Ram Mohun Mookerjee*, Marsh., 176; it was held that his case was properly decided against him.

Or make such order.—The Court is not bound to decree the case against the party who has not appeared, and may pass any order it deems fit—*Kadar Bhi* vs. *Raheman Bhi*, 3 Mad., 167; *Roop Narain Misr* vs. *Kashee Ram Singh Fimiliram*, 2 Alla., 67. It might proceed, for instance, to hear the case—*Shazada Pakaklai* vs. *Jaksiram Bhokalli*, 11 W. R., 5. Under section 170, Act VIII, 1859, no case could be dismissed or decreed on default unless some evidence had been given by the other party—*Ishan Chunder Ghose* vs. *Hurish Chunder Banerjee*, 12 W. R., 369; *Damoodhur Bhooshun* vs. *Rughoonath Panja*, 12 W. R., 242; *Chytunno Chunder Roy* vs. *Kedar Nath Roy*, 14 W. R., 99; *Thakoor Lall Misser* vs. *Brohmo Moyee Debee*, 15 W. R., 253; and on the same principle unless the plaintiff shewed a fair cause of action or the defendant a defence, the suit should not be decreed or dismissed under this section. The true rule appears to be that a suit should not be dismissed for non-attendance, unless there is a distinct order to attend, that it has been served upon the plaintiff or brought to his knowledge, that he has wilfully disobeyed it, and the evidence he has been required to give is material—*Pearee Mohun Bose* vs. *Hurish Chunder Ghose*, 17 W. R., 140; *Raj Chookun Duswandi* vs. *Busjeet Tewaree*, 20 W. R., 165.

See section 176.

CHAPTER X.

OF DISCOVERY AND OF THE ADMISSION, INSPECTION, PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

Power to deliver interrogatories

121. Any party may at any time by leave of the Court deliver through the Court interrogatories in writing for the examination of the opposite party, or where there are more opposite parties than one, any one or more of such parties, with a note at the foot thereof stating which of such interrogatories each of such persons is required to answer:

Provided that no party shall deliver more than one set of interrogatories to the same person without the permission of the Court, and that no defendant shall deliver interrogatories for the examination of the plaintiff unless such defendant has previously tendered a written statement and such statement has been received and placed on the record.

Judicature Acts, Order 31, Rule 1. This section applies to H. C. and M. S. C. C.

In the case of a person of unsound mind or a minor the next friend or some person acquainted with the facts, apparently, should answer—*Higginson* vs. *Holl*, 10 Ch. Div., 235.

Service of Interrogatories.

122. Interrogatories delivered under section 121 shall be served on the pleader (if any) of the party interrogated, or in the manner hereinbefore provided for the service of summons, and the provisions of sections 79, 80, 81 and 82 shall, in the latter case, apply so far as may be practicable.

This section applies to H. C. and M. S. C. C.

Discovery from Defendant.—In dealing with English cases on discovery, it is necessary to bear in mind the difference in procedure. There, a suit is commenced by a writ of summons endorsed with a statement of the nature of the claim or the relief asked for, which is served on the defendant; subsequently the plaintiff delivers a statement of his claim to the defendant, and the latter files his defence. In India a suit begins with a plaint, a copy of which will be usually served on the defendant; but in certain cases, instead of a copy of the plaint nothing more than a statement, similar to the endorsement on the writ in English law, need accompany the summons.

There are thus two modes of procedure in this country; one similar to the English, and another not so; for a plaint gives much more information than a concise statement.

Although the rule runs "at any time," a plaintiff will not be allowed discovery before filing his statement of claim—*Hancock* vs. *Guerin*, 4 Ex. Div., 3; unless it is clear that he has a good cause of action, but it is unable to state it properly without the information asked for—*Cashin* vs. *Craddock*, 2. Ch. D., 140; *Hancock* vs. *Guerin*, 4 Ex. Div., 3; *Harboard* vs. *Monk*, 9 Ch. Div., 616. Where it was clear that defendant had accused plaintiff of forgery, but the exact words used were not known, and the parties present when the imputation was made refused to give any information, interrogatories were put to the defendant as to the precise words used—*Atkinson* vs. *Fosbrooke*, L. R., 1 Q. B., 628; and in an action for breach of duty in carrying goods by sea, a similar application was allowed, as plaintiff could not file a statement of claim before discovery—*Ley* vs. *Marshall*, Weekly Notes, 1876, p. 23. Nor as a rule may he, before the statement of defence (corresponding to defendant's

written statement) has been filed, seek for discovery—*Strong* vs. *Tappin*, Weekly Notes, 1876, p. 22; for in a large majority of cases it is not possible until the defence is put in to tell whether the interrogatories are material, and it would be useless to interrogate on matters which would be at once admitted by the defendant.

Where interrogatories are delivered at such a stage of the case as render them liable to objection as improper, the defendant can, under section 125, refuse to answer unless sufficient reasons are shewn by the plaintiff (section 127)—*Mercier* vs. *Cotton*, 1 Q. B. D., 4421. But see in connection with this case—*Harboard* vs. *Monk*, 9 Ch. Div., 616.

In an action by executors, general rule stated—*Eade* vs. *Jacob*, 3 Ex. D., 335.

For forms of interrogatories see—*Chester* vs. *Wortley*, 18 C. B. 239.

Discovery from Plaintiff.—Defendant cannot obtain discovery until he has filed his written statement (section 121), and if he is anxious to seek the aid of discovery, he should file his written statement as quickly as possible, and then deliver interrogatories—*Disney* vs. *Longbourne*, 2 Ch. D., 704. See also *Haldane* vs. *Eckford*, L. R., 7 Eq., 425. The best time for delivering interrogatories is after the written statements have been filed and before the settlement of issues.

The same procedure may be adopted in miscellaneous proceedings after decree. Interrogatories as to accounts pending or to make the judgment available, or to find out how the property in cases of mesne profits has been managed, have been allowed, and no doubt will be admitted under this Code. Interrogatories can only be delivered in civil actions, and to the opposite party or parties, and if there are several parties, each cannot be compelled to answer more than relates to the case against himself—*Wigram*, p. 70. In a suit in which a corporation was plaintiff, the defendants could not file interrogatories for the examination of its former officers not parties to the suit—*Imperial Mercantile Credit Association* vs. *Whitham*, L. R., 3 Eq., 89.

The Courts will not allow discovery against persons over whom it has no direct jurisdiction in the action pending. Formerly in the Equity Courts, if discovery was required by the plaintiff from some one not a party to the action, he was made a defendant. No doubt, similar attempts will be made in this country under this procedure. And unless the superior Courts are vigilant in compelling the Courts of first instance to strike out every person not properly a party to the suit, the evil caused by these sections will be incalculable. Already it is a common practice to load the record with the names of persons not interested, either to guard against their appearing as witnesses, or that they may file written statements in support of the plaintiff.

For forms of interrogatories see—*Flitcroft* vs. *Fletcher*, 11 Exch. 543.

Leave of the Court.—Applications under these sections should be made in chambers on petition, and the order is "The plaintiff be allowed to interrogate" This order may be subsequently discussed in Court. The interrogatories are then settled and signed by counsel, and then taken before the Judge or Registrar for delivery to the other party. The duty of the Court is to determine whether the appellant should be allowed to interrogate the other side but not to determine what questions the party interrogated should be compelled to answer. If the interrogatories are scandalous, or in any way an abuse of the process of the Court; the Court may interfere at any stage of the suit. In other cases the party interrogated may, at his peril, omit to answer the interrogatories to which he objects. Then the interrogating party should apply to the Court under section 127, *post*, for an order requiring the other party to answer or answer further, either by affidavit or *viva voce* examinations as the Judge directs or the party interrogated may take a more cautious course, he may file his affidavit in answer stating in it his objections to answer such questions as he objects to and the interrogating party, if dissatisfied can apply under section 127—*Mundle* vs. *Biswas*, 5 C. L. R., 509; I. L. R., 5 Cal., 707; and see discovery for defendant, *ante*.

Inquiry into property of exhibiting interrogatories.

123. The Court, in adjusting the costs of the suit, shall, at the instance of any party, inquire or cause inquiry to be made into the propriety of delivering such interrogatories; and if it thinks that such interrogatories have been delivered unreasonably, vexatiously or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

Judicature Acts, Order 31, Rule 2. This section applies to H. C. and M. S. C. C.

By section 121 interrogatories cannot be delivered except with the leave of the Court. This is the same as section 51 of the Common Law Procedure Act of 1854. In practice such leave was given in chambers, when the Judge would make enquiry into the propriety of delivering the interrogatories, and if they were objectionable he would disallow the application with costs. Under the judicature rules the necessity of getting leave of the Court to administer interrogatories before the close of the pleadings was done away with, but a rule (XXXI, 2), similar to the present section, was inserted as a check on the party interrogat-

ing. Our procedure is therefore neither that of 1854 nor that of 1875, but a combination of both. It is difficult to see why a party should pay costs for interrogatories allowed by the Judge.

Service of interrogatories on officer of corporation or company.

124. If any party to a suit be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply to the Court for an order allowing him to deliver interrogatories to any member or officer of such corporation, company or body, and an order may be made accordingly.

Judicature Acts, Order 31, Rule 4. This section applies to H. C. and M. S. C. C

Formerly, the officers of a corporation could not be interrogated unless they were personally parties to the suit—See *Republic of Peru* vs. *Weguelin*, L. R., 20 Eq., 140; under the present Code this is not so—*Wilson* vs. *Church*, 9 Ch. Div., 553; the ordinary practice will probably be not to direct a member of the corporation to answer if it is shewn that there is a competent officer who has a sufficient knowledge of the facts. The Company's solicitor should act for the member or officer who is directed to answer, and prepare the answers for him, and charge the Company with the cost of so doing. He should not employ a separate solicitor—*Berkley* vs. *Discount Co.*, 13 Ch. Div., 97; 9 Ch. Div., 643.

The order should not be made if the interrogatories are objectionable. In an action on a policy an application was made for an order to deliver interrogatories to an officer of the defendant company. An objection was raised on behalf of the defendant to the interrogatories, and it was contended for the plaintiff that the nature of them could not be gone into at that stage of the case, but that defendant could object (section 125); *Held*, that whenever an order of Court is necessary, the interrogatories will be gone into on the application for the order, and that such order will not be granted as of course—*Hewitson* vs. *Whittington Life Insurance Society*, Weekly Notes, 1875, p. 219.

Power to refuse to answer interrogatories as irrelevant, &c.

125. Any party called upon to answer interrogatories, whether by himself or by any such member or officer, may refuse to answer any interrogatory on the ground that it is irrelevant, or is not put *bonâ fide* for the purposes of the suit, or that the matter inquired after is not sufficiently material at that stage of the suit, or on any other like ground.

Judicature Acts, Order 31, Rule 5. This section applies to H. C. and M. S. C. C.

The rule corresponding to this section allows either party to apply at chambers to strike out objectionable interrogatories. When a party refuses to answer, the party interrogating must apply to the Court, for an order under section 127, requiring him to answer, and the application should shew the grounds on which it is based —See *The Princess of Wales* vs. *The Earl of Liverpool*, 1 Swans., 126. See note under section 122, *ante*.

Discovery is based on the following propositions :—

I.—It is the right, as a general rule, of a plaintiff in equity to examine the defendant upon oath as to all matters of fact which, being well pleaded in the bill, are material to the proof of the *plaintiff's case*, and which the defendant does not by his form of pleading admit.

II.—Courts of Equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defence. With this (if a) qualification, the right of the plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the *defendant's case* is to be established, or to any discovery of the defendant's evidence.

III.—Interrogatories for the examination of a plaintiff differ from those for the examination of a defendant in this respect, that though a plaintiff or defendant is not entitled to discovery of his opponent's case, a defendant may ask any question tending to destroy the case of the plaintiff—*Hoffmann* vs. *Postile*, L. R. 4 Ch., 673; *Commissioners of Sewers of City of London* vs. *Glasse*, L. R., 15 Eq., 302.

General Rule.—A party is entitled in the Common Law Courts to discovery of everything which makes out his own case, or shews that he is in the right: and this includes specific allegations in the nature of a replication to an anticipated defence—*Dossee Bemolamoney* vs. *Hullodhur Bullub*, 1 Boulnois 618; but not to discovery of matters which support his opponent's case, or show that his opponent is right. The influence of Baron Alderson, who had been accustomed to proceedings in equity, led the way to allowing such interrogatories in suits for ejectment, where the defendant had been long in undisputed possession of the premises sought to be recovered and was ignorant of the nature of the title set up; but where a tenant withheld possession after the termination of his lease, and was sued for possession, it was decided that he could not interrogate the plaintiff as to whether his title had expired—*Wallen* vs. *Forrestt*, L. R., 7 Q. B., 239; and in an action of trover for cotton the defendant was not allowed to ask the plaintiff how and when he became possessed of, and entitled to it—*Finney* vs. *Forwood*, L. R., 1 Ex., 61; see *The Derby Commercial Bank* vs. *Lumsden*, L. R., 5 C. P., 107. On the other hand, where in an action by surviving parties, the defendant pleaded a settlement of the account between him and the deceased by a bill not due, he was allowed to be asked, as to the circumstances of the alleged settlement, whether he had ever drawn, accepted or delivered the bill as stated in his plea—*Hawkins* vs. *Carr*, L. R., 1 Q. B., 89; where in an action by executors against the makers of a note given to the testator, and defendant pleaded part payment to the testator, the defendant was interrogated as to the time, place, and circumstances under which the alleged payment took place—*Hills* vs. *Wates*, L. R., 9 C. P., 488; see, however. *Eade* vs. *Jacob*, 3 Ex. Div., 335. From these cases, and especially the judgments of Coleridge, C.J., and Grove, J., in the case just cited, it would appear that a party may be interrogated in the Common Law Courts about matters connected with their case, provided such matters are essential, and exclusively within their knowledge. See also *Towne* vs. *Cocks*, L. R., 9 Ex., 45; *Stewart* vs. *Smith*, L. R., 2 C. P., 293.

One party may be interrogated as to any admissions he may have made tending to support his opponent's cause of action—*Hodsall* vs. *Taylor*, L. R., 9 Q. B., 79; and he cannot object to discovery on the ground that such admissions were made in conversations with a servant or agent of the other party who might be called as a witness—*Bird* vs. *Walzey*, 1 C. B., N. S., 308. It should be borne in mind, however, that, by section 23 of the Evidence Act (Act I of 1872), "in civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given;" provided that no legal adviser shall be excused from giving evidence of any communication made to him for an unlawful purpose, or of any fraudulent act which may come under his notice as legal adviser. It is enacted by section 22 of the same Act that "oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shews that he is entitled to give secondary evidence of the contents of such document" under the recognized rules of procedure in such cases, or "unless the genuineness of such document is called in question." The same rules prevail in English law, and the Courts, keeping well within them, would not grant any order for discovery where the proposed interrogatories related to the contents of, or would have a tendency to contradict, a written document—*Moor* vs. *Roberts*, 2 C. B., N. S., 680.

No rules have been framed for the guidance of our Courts in discovery, and probably the question may be dealt with subject to the provisions of sections 127 and 131, as if the party interrogated was in the witness-box, and all questions will be allowed which the party interrogated would be bound to answer if he were a witness—*Lychlinski* vs. *Mathy*, 10 C. B., N. S., 838; *Hodsoll* vs. *Taylor*, L. R., 9 Q. B.,

81. On this principle a party could plead all the exceptions allowed under the Evidence Act, and interrogatories will be disallowed regarding: (1) Matters of law—*Hoffman* vs. *Postile*, L. R., 4 Ch., 673; (2) The conduct of a party in Court as Judge or Magistrate, or anything which came to his knowledge as such (section 121, Act I, 1872); (3) Communications made during marriage, except in a suit between husband and wife (*id.*, section 122); professional communications (section 126); confidential communications with legal advisers (section 129); or matters of State derived from unpublished documents (section 123). Probably, the objection that the answers might subject him to a criminal prosecution, a civil suit, a penalty or a forfeiture might not be considered by itself as sufficient (*id.*, section 132). Even the English cases on this subject are not uniform: See *The Mary or Alexandra*, L. R., 2 A. & E., 319, and the cases cited there; *Fisher* vs. *Owen*, 8 Ch. Div., 645; *Allhusen* vs. *Labouchere*, 3 Q. B. Div. 654.

Where the guardian of a ward of Court absconded with the ward, it was held that the guardian's solicitor was bound to give all the information he could to aid in finding them—*Ramsbotham* vs. *Senior*, L. R., 8 Eq., 575.

Irrelevant.—Irrelevant interrogatories should not be allowed. In a suit on a partnership deed, in which it was stated that a certain sum was to be taken as £6,000, interrogatories as to the items of which it is composed were not allowed—*Wier* vs. *Tucker*, L. R., 14 Eq., 25. In a suit for specific performance by plaintiffs, trustees of a married woman, defendant was not allowed to ask: (1) Whether the plaintiffs were not trustees of the money intended to be employed in the purchase? (2) What were the terms of the trust? (3) Whether it was not a breach of trust to employ the funds in the purchase of an under-lease? (4) As to the custody of the trust deeds—*Mansfield* vs. *Childerhouse*, Weekly Notes, 1876, p. 258; 4 Ch. D., 83; in an action for the price of a horse sold, where defendant pleaded the horse had been falsely represented to be quiet and a good worker, he was not allowed to ask the plaintiff: (1) Was the horse, which is the subject of this action, the property of the plaintiff at the time of sale? (2) If it was your property, how did it become so?—*Sivier* vs. *Harris*, Weekly Notes, 1876, p. 22; so, in an action by a principal against his agent for money received interrogatories by the defendant to shake the character of the plaintiff were not allowed—*Baker* vs. *Newton*, Weekly Notes, 1876, p. 8. In an action for libel against a newspaper company and a man named Jackson, it was ruled that interrogatories as to whether Jackson was publisher and supervisor of the paper, whether he was a shareholder in the Company, by whom the libellous paragraphs were brought to the office, and whether they were printed by Jackson or the Company, were allowed. Interrogatories as to whether he was editor, wrote the paragraphs, saw and cautioned them, and whether he or the Company had the originals, and if they objected to produce them, were disallowed—*Cater* vs. *Leeds Daily News Company and Jackson*, Weekly Notes, 1876, p. 11. In an action for damages for seduction, the defendant cannot be asked how rich he is—*Hodson* vs. *Taylor*, L. R., 9 Q. B., 79.

Good Faith.—Even if the interrogatories are relevant, they may be objected to on the ground that they have not been *put bonâ fide for the purposes of the suit.* All questions put *malâ fide*, with an ulterior object beyond that of helping the suit, should be disallowed—*Baker* vs. *Lane*, 3 H. C., 544: explained in *Beckford* vs. *Dency*, L. R., 1 Ex., 357; *The Mary or Alexandra*, L. R., 2 A. & E., 319. When the onus of proof rests on a party, it seems reasonable that he should be allowed to interrogate his adversary; but when the onus of proof rests on a defendant, then, as a general rule, the plaintiff cannot require discovery of the matter for the purposes of the suit. In *Joy* vs. *Keekewick*, 2 Vesey, 679, plaintiff claimed as heir *ex-parte materna*, stating there was no heir *ex-parte paterna;* defendant claimed *ex-parte paterna.* Plaintiff then asked discovery as to how he was heir, and to set forth all particulars of the births, deaths, and marriages of those through whom he claimed. The Lord Chancellor said: "This is a fishing bill to know how a man makes out his title as heir. He is to make it out; but he has no business to tell the plaintiff how he is to make it out. Allow the demurrer." But the plaintiff has no right to claim a similar indulgence. He comes uninvited into Court, and is bound to do equity. The defendant, it is submitted, has a right to interrogate him in self-defence on matters tending to destroy his claim, and this is nearly what the third rule comes to. Referring to this principle, Lord Selborne, L.C., said in *Minet* vs. *Morgan*, L. R., 8 Ch. App., 364: "Now we have nothing to do with the question whether that protection is or is not based on sound principles, but only with the question whether it ought to be extended to the documents in this case. There might, perhaps, be great reason for holding that, if a man comes into Court as plaintiff attacking some

body else, he ought to be bound to disclose every thing on which he relies for the purpose of his attack. But that undoubtedly is not the present rule of the Court." It is to be hoped that the Courts of India, not trammelled as yet by any rules, may follow it.

Material to the suit.—A third objection is that they are "not sufficiently material at that stage of the suit." The word material means more than relevant, and in the sense it is here used means material as to the *case* made and *the relief* prayed for at the stage of the case when discovery is sought (Wigram, 45). What is material at one stage of a suit may not be material at another. For instance, if defendant moved to take the plaint off the file on the ground that it shewed no cause of action at all, or a cause of action barred, interrogatories on the merits would not be allowed until the motion had been decided, for if the plaint were struck off, no necessity for discovery would arise. But if he files a written statement and oins issue, he will be liable to answer on the whole suit, though whether he will be compelled to do so or not will depend on the peculiar features of the case—*Chichester* vs. *Marquis of Donegal*, L. R., 4 Ch. App., 419. In *Moore* vs. *Craven*, L. R., 7 Ch. App., 95, defendant who was sued, as a hop agent, denied the agency. He was asked to give the names of the persons to whom he had sold: Lord Hatherley, L. C., said: "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but when the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case; and whilst on the one hand it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other hand it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing. Here the question to be decided is agency or no agency. If the agency is proved, the defendant admits that there would be a right to an account. The names and addresses of the purchasers, even if fully set out, would not in any way tend to prove agency. The interrogatory therefore is not material to the issue about to be tried, and the exception must be overruled with costs." And, on the same grounds as those given in this judgment, a plaintiff will not, as a rule, be granted discovery to which he is not entitled if he is wrong, and which if he wins will follow as of course. Thus in a case of infringing of trade marks, defendants, who had sealed up certain parts of entries and letters admitted to relate to the matters in question in the suit, were ordered by the first Court to unseal (1) the names of customers and of places, and the prices, forming parts of such entries; and (2) the portions of letters and copies of letters which contained the names of the writers and of the persons to whom the letters copied were sent; and (3) the places to and from which the letters were sent and (4) the description of the marks to be placed, or which had been placed on the goods referred to in such letters. *Held*, on appeal, that they ought not to be compelled to disclose the names of their customers, or the names of the persons to or from whom the letters were sent or received, or any prices, inasmuch as their discovery might be used in a manner prejudicial to the defendants in their trade, and was not likely to assist the plaintiffs in making out their case at the hearing: the rest of the order was upheld—*Carver* vs. *Pinto Leite*, L. R., 7 Ch. App., 90; *Bagnall* vs. *Carlyon*, Weekly Notes, 1874, p. 215. Where the question is one of agency, discovery of the alleged agent's private transactions will not be allowed till the first point has been decided—*Great Western Colliery Co.* vs. *Tucker*, L. R., 9 Ch. App., 337; but discovery, though merely useful for the purposes of consequential relief after decree, will in England be ordered before decree, unless it be productive of unnecessary hardship on the defendant; thus in a suit for account based on a partnership, defendant was compelled to answer whether he had drawn out partnership moneys on his own account, although he objected to answer before the plaintiff had established the partnership—*Saull* vs. *Browne*, L. R., 9 Ch., 364; and a mortgagee in possession admitting the mortgage, must answer as regards the state and particulars of the account before decree—*Elmer* vs. *Creasy*, L. R., 9 Ch. App., 69; *West of England Bank* vs. *Nicholls*, 6 Ch. D., 613; and in a suit for specific performance where the contract was not denied, defendant was compelled to set out the names of the persons to whom he had subsequently let out the premises, to give an account of the rents, and state if the plaint was not deteriorating—*Dixon* vs. *Fraser*, L. R., 4 Eq., 497. Where the defendant's object has been to pay money into Court in satisfaction, he will be allowed to interrogate the plaintiff as to the particularity of the damage sustained by him—*Horne* vs. *Hough*, L. R., 9 C. P., 135.

Interrogatories regarding legal proceedings in a foreign country are not material —*Hoffmann* vs. *Postile*, L. R., 4 Ch. App., 678.

Any other like ground.—Objectionable or oppressive interrogatories should be struck out—*Winters* vs. *Dabbs*, Weekly Notes, 1876, p. 21. In a suit to set aside an agreement under which a partnership had been dissolved, plaintiff asked defendant to set forth the partnership accounts. The latter answered that the accounts were extensive, and he had no means of setting them out without paying an accountant, which he ought not be compelled to do as plaintiff had access to them. *Held*, a good answer—*Lockett* vs. *Lockett*, L. R., 4 Ch. App., 336.

Time for filing affidavit in answer.

126. Interrogatories shall be answered by affidavit to be filed in Court within ten days from the service thereof or within such further time as the Judge may allow.

Judicature Acts, Order 31, Rule 6. This section applies to H. C. and M. S. C. C.

An affidavit not sworn to before the proper authority may be admitted with the consent of the other side—*Bell* vs. *Turner*, L. R., 17 Eq., 439; *Lyle* vs. *Edward*, L. R., 15 Eq., 67; and even if it has not been made on oath, it may be filed under similar circumstances, if certified to by the person before whom it was made—*Bacon* vs. *Turner*, Weekly Notes, 1876, p. 292.

The application for further time will not be granted as a matter of course, but should be supported by affidavit—*Brown* vs. *Lee*, 11 Beav., 92; see also *Byng* vs. *Clark*, 13 Beav., 99. For form of order see *Weston* vs. *Cohen*, Weekly Notes, 1869, p. 74.

Procedure where party omits to answer sufficiently.

127. If any person interrogated omits or refuses to answer, or answers insufficiently, any interrogatory, the party interrogating may apply to the Court for an order requiring him to answer or to answer further, as the case may be. And an order may be made requiring him to answer or to answer further either by affidavit or by *vivâ voce* examination as the Judge may direct: Provided that the Judge shall not require an answer to any interrogatory which in his opinion need not have been answered under section 125.

Judicature Acts, Order 31, Rule 10. This section applies to H. C. and M. S. C. C.

If interrogatories are scandalous or in any way an abuse of the Court, the Court may interfere at any stage. In other cases the party interrogated may either omit to answer, or file an affidavit in answer stating in it his objections to answer such questions as he objects to. Then the course for the interrogating party is to apply under this section for an order requiring the opposite party to answer or to answer further, as the case may be, either *vivâ voce* or by affidavit—*Mundle* vs. *Biswas*, I. L. R., 5 Cal., 707; 5 C. L. R., 509.

Practice.—A party at whose instance interrogatories have been administered must put in the answers as part of his evidence if he wishes to use them at the hearing—*Gosto Behary Pal* vs. *Pal*, I. L. R., 4 Cal., 836; 4 C. L. R., 164.

The general rule is, that the person answering must answer fully. It is not sufficient to answer from his own knowledge; he is bound to speak according to his knowledge, information and belief; if he has none, he should say so. Thus, where a defendant said: "I am personally wholly unacquainted with the facts inquired about by the said interrogations and am unable to answer any of them from my own knowledge, save in as hereafter appears," the answer was held insufficient—*The Minnehaha*, L. R., 3 A. and E., 148.

Plaintiff company stated that defendants were directors and had sold the company property in which they were interested, and asked for an account of the profits derived by the defendants from the sale. Defendants appeared and issues were fixed. They then refused to answer on the grounds that the company had joined issue, that the pleadings were closed, and that the interrogatories did not refer to any issue raised; but the objections were set aside, and they were ordered to answer fully—*Chesterfield, &c.* vs. *Black*, Weekly Notes, 1876, p. 204.

Answers to interrogatories may be insufficient by reason of containing, in addition to the information asked for, impertinent or otherwise objectionable matter—*Peyton* vs. *Harling*, L. R., 9 C. P., 9.

Power to demand admission of genuineness of documents.

128. Either party may, by a notice through the Court, within a reasonable time not less than ten days before the hearing, require the other party to admit, (saving all just exceptions to the admissibility of such document in evidence) the genuineness of any document material to the suit.

The admission shall also be made in writing signed by the other party or his pleader and filed in Court.

If such notice be not given, no costs of proving such document shall be allowed, unless the Judge otherwise orders.

If such notice is not complied with within four days after its being served, and the Judge thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the suit.

C. L. P. Act, 1854, section 117; Judicature Acts, Order 32, Rule 2. This section applies to H. C. and M. S. C. C.

The party interrogated must object on oath; the mere assertion of his counsel is not sufficient—*McFadden* vs. *Mayor and Corporation of Liverpool*, L. R., 3 Ex., 281.

Notice.—No form has been given in the appendix, but from the form in the English rules it should run as follows:

In the Court of at

A. B. vs. *C. D.*

Take notice that the plaintiff (or defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant (or plaintiff), his solicitor or agent or vakil at on between the hours of ; and the defendant (or plaintiff) is hereby required within from the last-mentioned date to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been: that such as are specified as copies are true copies, and such documents as are stated to have been served, sent, or delivered, were so sent, served, or delivered, respectively; saving all just exceptions to the admissibility of all such documents as evidence in the cause.

Dated of 18

To E. F., solicitor (or vakil or authorised agent) for defendant (or plaintiff).

G. H., solicitor (or vakil or agent) for the plaintiff (or defendant).

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A. B. and C. D. first part, and E. F. second part	Jan. 1st, 1848.
Indenture of lease of A. B. and C. D.	Feb. 1st, 1848.
Indenture of release between A. B., C. D. first part ...	Feb. 2nd, 1848.
Letter.—Defendant to plaintiff	Mar. 1st, 1848.
Policy of insurance on goods by ship "Isabella" on voyage from Oporto to London	Dec. 3rd, 1847.
Memorandum of agreement between C. D., captain of said ship, and E. F.	Jan. 1st, 1848.
Bill of exchange for £100 at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H. ...	May 1st, 1849.

COPIES.

Description of Documents.	Dates.	Original or duplicate served, sent, or delivered; when, how, and by whom.
Register of baptism of A. B. in the Parish of X.	Jan. 1st, 1848.	
Letter.—Plaintiff to defendant	Feb. 1st, 1848.	Sent by post, Feb. 2nd, 1848.
Notice to produce papers	Mar. 1st, 1848.	Served, Mar. 2nd, 1848, on defendant's pleader by E. F. of
Record of a judgment of the Court of in an action *Is.* vs. *I. N.*	Jan. 1st, 1840.	
Letters Patent of King Charles II. in the Rolls Chapel	Jan. 1st, 1860.	

From this form it is evident that notice should be given of *all* documents intended to be used in evidence, whether in possession or otherwise, and even though the opposite party had stated he would not admit them—*Ruther* vs. *Chapman*, 8 M. & W., 388; *Story* vs. *Houlditch*, 1 Scott's N. R., 211; *Spencer* vs. *Borough*, 9 M. & W., 425; even though it might be doubtful whether the document, for instance a copy of a deposition or a counterpart, might be legally admissible—*The Cromwell*, L. R., 3 A. & E., 316; *Doe* vs. *Smith*, 8 Ad. & El., 255. Otherwise "no costs of proving such document shall be allowed."

The admission "saving all just exceptions to the admissibility of such document in evidence" does not enable a party to use copies as evidence, without laying a foundation for the secondary evidence by giving notice to the opposite party, &c.—*Sharpe* vs. *Lamb*, 11 A. & E., 805; or prevent the party admitting from objecting on the ground that the document has not been sufficiently stamped—*Vane* vs. *Whittington*, 2 Dowl., N. S., 757; but an admission of a document made by A as agent, is an admission of his authority—*Wilkes* vs. *Hopkins*, 1 C. B., 737.

Expense of proving such document.—If the party serving notice fails to prove the document, the party refusing to admit will not be made liable for the costs

of the unsuccessful attempt—*Stracey* vs. *Blake*, 7 C. & P., 404; *Doe* vs. *Peters*, 1 C. & K., 279; *Treeman* vs. *Rosher*, 6 D. & L., 517.

Power to order discovery of document.

129. The Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order.

Affidavit in answer to such order.

Every affidavit made under this section shall specify which, if any, of the documents therein mentioned the declarant objects to produce, together with the grounds of such objection.

Judicature Acts, Order 31, Rules 12-13. This section applies to H. C. and M. S. C. C.

A party must apply before the first hearing and must shew that he has a *primâ facie* case, or shew other sufficient cause in support of the application—*Lane* vs. *Gray*, L. R., 16 Eq., 552; *Mostyn* vs. *Western Coal and Iron Company*, Weekly Notes, 1875, p. 260, but see p. 230, and Weekly Notes, 1876, p. 24; and if it appears that the application is not urgent, and the effect of granting it would be to unduly retard the progress of the suit, it should be refused—Weekly Notes, 1875, p. 238. It need not contain mention of any documents, for it is probable that the applicant may not know the documents in his adversaries' possession until he gets his affidavit—Weekly Notes, 1876, pp. 22, 24. The party against whom the order issues must describe all his documents in the affidavit, although he asserts that he cannot be compelled to produce the documents—*Rumbold* vs. *Forteath*, 3 K. & J., 44; see also *Evans* vs. *Louis*, L. R., 1 C. P., 656; and the affidavit must be made by the party himself.—Wilson J. Feb. 17 1879, or in case he is of unsound mind by the guardian or next friend or some person acquainted with the fact—*Higginson* vs. *Hull*, 10 Ch. Div., 235. So when the party is a corporation or a Government and cannot make an affidavit or the affidavit must be made by some person on the party's behalf—*Priolean* vs. *United States of America*, L. R., 2 Eq., 659; *Princess of Wales* vs. *Earl of Liverpool*, 1 Sev., 114; *Republic of Liberia* vs. *Roye*, 1 App. Cas., 139.

The order should not issue against the solicitor of the party from whom discovery is demanded—*Cashin* vs. *Craddock*, L. R., 2 Ch. D., 140.

The affidavit should be in the following form with such variations as circumstances may require:

In the Court of at

A. B. *vs.* C. D.

I, the above-mentioned C. D., make oath and say as follows:

1. I have in my power or possession the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto.

3. That (*here state upon what grounds the objection is made, and verify the facts as far as may be, for the party must make the discovery, although he asserts that he cannot be compelled to produce—Rumbold* vs. *Forteath*, 3 K. & J., 44; *Lazarus* vs. *Mosely*, 5 Jur. N. S., 1110; *Nicholl* vs. *Jones*, 13 W. R., 451.)

4. I have had, but have not now in my possession or power the documents relating to the matter in question in this suit set forth in the second schedule here-

to. (*Merely stating "I have not, &c.," is insufficient, the party must state what he has had in his power*, Weekly Notes, 1876, p. 38.)

5. The last-mentioned documents were last in my possession or power on (*state when*).

6. That (*here state what has become of the last-mentioned documents, and in whose possession they are now*).

7. According to the best of my knowledge, information and belief, I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my solicitors, pleaders or agents, solicitor, pleader or agent, or in the possession, custody or power of any other persons or person on my behalf (*possession of the agent is possession of the party—Aeid* vs. *Langlois*, 14 Jur., 467; *Morice* vs. *Swaby*, 2 Beav., 500, &c.) any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from, any such document or any other document whatsoever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

In England, a party seeking discovery must, as a general rule, rest on the affidavit; he cannot cross-examine upon it, nor adduce evidence to contradict it. If he can shew from the pleadings that the deponent has made a statement inconsistent with his affidavit, the Court may compel him to make a further affidavit, but not otherwise—*Wright* vs. *Pitt*, L. R., 3 Ch., 809; *Noel* vs. *Noel*, 1 D. J. & S., 468; *Kenelly* vs. *Wyman*, I. L. R., 1 Cal., 178. At the same time the party is not without other remedies. If the affidavit does not give a distinct description of the documents he can take out a summons to consider the sufficiency—*Lazarus* vs. *Mosely*, 5 Jur. N. S., 1110; and further, if the Court is satisfied that material documents not mentioned are in the deponent's possession, he will be compelled to make a further affidavit—*Saull* vs. *Browne*, L. R., 17 Eq., 402. Where a defendant after answer has obtained an affidavit as to documents in the common form, and he finds the common form is not sufficiently pointed to obtain discovery as to particular matters, he can file a concise statement of them with interrogatories, and it will be no answer for the other side to say that some of the matters given in the specific statement were comprised in, or that they were all referred to, in the answer, and that the first affidavit was sufficient—*Newall* vs. *The Telegraph Construction Company*, L. R., 2 Eq., 756.

Power to order production of documents during suit.

130. The Court may, at any time during the pendency therein of any suit, order the production by any party thereto of such of the documents in his possession or power relating to any matter in question in such suit or proceeding as the Court thinks right; and the Court may deal with such documents when produced in such manner as appears just.

Judicature Acts, Order 31, Rule 11. This section applies to H. C. and M. S. C. C.

At any time.—A party who has obtained privately, by interrogatories, or in the manner laid down in the last section, knowledge of the documents in the hands of his adversary, may proceed under this section to enforce their production. The application may be made at any time even in appeal—*In re National Funds Assurance Company*, Weekly Notes, 1876, p. 192; but not, except in peculiar cases, before plaintiff has filed his written statement if the defendant has been served with a concise statement instead of a copy of the plaint—*Cashin* vs. *Craddock*, 2 Ch. D., 140.

The order must be made by the Court—*In re Leigh's Estate*, Weekly Notes, 876, p. 266; and should not issue against any person not a party: not even a party's solicitor—*Cashin* vs. *Craddock*, 2 Ch. D., 140; nor is a verbal order to a pleader sufficient—*Doorgamonee Dossee* vs. *Benode Monee*, W. R., 1864, p. 1641; and if a person having no interest in the suit has been made a party to obtain production of documents, he should apply to have his name struck out of the record as soon as possible. The order for production will not be made unless the Court is satisfied that the documents are essential to the party's suit, *at the time they are applied for (id.)*; and if the discovery is such as might be prejudicial to the defendant irrespective of the suit, the Court will look narrowly to the question whether there is a reasonable prospect of its being of material service to the plaintiff at the hearing. But if the document is material, it must be produced unless it is privileged. In England, the

general rule is that, as to relevancy, the Court accepts the statement of the party from whom production is required, if he swears that to the best of his knowledge, information and belief the documents called for do not contain anything impeaching his case, or supporting or material to the case of the other party—*Minet* vs. *Morgan*, 8 L. R., Ch. App., 361. How far this rule will be carried out in our Courts, it is impossible to say; but in the absence of any settled practice, it might be well to follow the rule laid down in section 162 of the Evidence Act, which empowers the Judge to decide any question of production or admissibility. Similarly, in the Equity Courts when documents are material, the person interrogated may seal up such parts as he swears are privileged—*Talbot* vs. *Marshfield*, 1 L. R. Eq., 6; and his affidavit will prevail unless there is such an inconsistency on the record as leads to the belief that the affidavit is not true—*Greenw od* vs. *Greenwood*, 6 W. R., 119. In the High Court when the right of a party producing documents, to seal certain portions of them is contested the Court appoints an officer to whom the plaintiff states in confidence why he wants to inspect any portion of the documents sealed, and the officer after looking at the documents reports whether and in what way the part sealed or desired to be sealed is material to the case of the other party—*Heeralall Rukkit* vs. *Ramsurun Loll*, I. L. R., 4 Cal., 835. See the note under section 125, *supra*.

Privilege.—A Judge has no discretion as to refusing to allow the production of documents in possession of a party to the suit relating to the matter in issue unless they are privileged—*Wallace* vs. *Jefferson*, I. L. R., 2 Bom., 453. The law as regards privilege will doubtless follow the Evidence Act; and, if so, it is probable that production of the following documents will not be enforced.

1. Documents connected with a party's conduct as Judge or Magistrate in Court, or anything which came to his knowledge in Court as such (section 121.)

2. Communications made during marriage, except in suits between husband and wife (section 122).

3. Unpublished documents of State (section 123).

4. Official correspondence where the public interests would suffer by the disclosure (section 124).

5. Documents containing information concerning commission of an offence given to a Magistrate or Police Officer (section 125).

6. Professional communications (section 126), of a confidential or private nature—*Mamon Hajee Haroon Mahammad* vs. *Molvi Abdul Karim*, I. L. R., 3 Bom., 91. The law on this point in England is as follows:—

(1). Communications between parties or their solicitors and a third party with a view to the institution of proceedings against defendants, and which resulted in the action, are exempted, not on the ground of professional communications, but because they are communications given with a view to anticipated litigation and for the purpose of enabling it to be carried on successfully—*McCorkindale* vs. *Bell*, 1 Ch. D., 471, and the cases therein cited; but then the Court has a discretion, and if a strong case were made out it might compel such communication between a party's solicitor and a third person to be produced—*Fenner* vs. *London and South-East Railway*, L. R., 7 Q. B., 767. This goes much further than the Indian Evidence Act, which allows no privilege to communications with an agent—*Queen* vs. *Chandrakaunt Chakrabarty*, 1 B. L. R., Cr., 8.

Statements laid before counsel for obtaining legal advice are privileged—*Munchershaw Bezonji* vs. *The New Dhurmsey Spinning and Weaving Co.*, I. L. R., 4 Bom., 631.

(2). Also all correspondence between a party or his predecessors in title and their solicitors as such, with respect to questions connected with the matters in dispute in the suit although made before any litigation was in contemplation—*Minet* vs. *Morgan*, L. R., 8 Chan. App., 361; *Thomas* vs. *Rawlins*, 27 Beav., 140; *Wheatley* vs. *Williams*, 1 Mees. and W., 533; *Carp Mail* vs. *Powis*, 1 Phil., 686; *Bacon* vs. *Bacon*, Weekly Notes, 1876, p. 96, and a letter written by the solicitor of two plaintiffs to the solicitor of a third plaintiff is within the rule—*Ray* vs. *Poorunchand Poonalal Javherry*, I. L. R., 4 Bom., 631. But no privilege attaches where a person is charged with fraud, as regards communication between himself and his solicitor on this subject—*Gartside* vs. *Outram*, 26 L. J. (Ch.), 113; nor by one party against another when the communications were made on behalf of them all—*Reynell* vs. *Sprye*, 10 Beav., 51; *Tugwell* vs. *Hooper*, 10 Beav., 348; and no privilege at all attaches unless the communication is of a professional or quasi-professional nature, *i.e.*, a communication made by the party's solicitors, or by an agent in consequence of their suggestion. Thus a letter written by an agent direct on the subject-matter is not privileged—*Bustris* vs. *White*, 1 Q. B. Div., 139; even though marked private and confidential—*Hopkinson* vs. *Lord Burleigh* L. R., 2 Ch., 477; and after litigation was highly probable—*Anderson* vs. *Bank of Brit. Columbia*, 2 Ch. D., 644—*Wallace* vs. *Jefferson Jr.*, I. L. R., 2 Bom., 453.

A mortgagee is bound to produce the mortgage deed, but not the title deeds, for the inspection of the mortgagor—*Patch* vs. *Ward*, L. R., 1 Eq., 436; but when the time for redemption is passed, and the mortgage is not impugned; if the mortgagor wants to see the deed, his title to redeem being admitted, he must pay the principal,

nterest and costs before production—*Chichester* vs. *Marquis of Donegal*, L. R., 5 Chan., 502; compare section 130 of the Evidence Act which refers only to witnesses, but probably the same rule would hold in our Courts.

In a redemption suit by a second mortgagee against the first mortgagee, the defendant is bound to state in answer to interrogatories not only the amount due upon his security, but also what securities he holds for his debt—*West of England and South Wales Bank* vs. *Nicholls*, 6 Ch. D., 613.

Where documents are privileged the fact that portions of them have been read to the plaintiff's solicitor by the solicitor of the defendant, does not amount to waiver of privilege as regards the parts not read, but in regard to the parts read plaintiff's solicitor may be called as a witness and compelled to state in evidence what took place at the meeting, including the substance of the portions read by him—*Kay* vs. *Pooranchand Poonalal Javherry*, I. L. R., 4 Bom., 631.

Control of possession.—There is no power to compel a party to produce documents not in his control or possession. A, the owner of a ship and cargo, insured it, and then sold the cargo and freight to B. The ship was lost, and C, the broker, sued on behalf of B. A also sued for the insurance money. *Held*, C's action could not be stayed until he produced an affidavit of documents in A's possession—*Fraser* vs. *Burrows*, Weekly Notes, 1877, p. 76. By possession is generally meant exclusive possession; production cannot be enforced of documents in joint possession of the party and a third person not joined in the suit—*Hadley* vs. *McDougall*, L. R., 7 Ch. App., 312; if the joint possession is proved to the satisfaction of the Court—*Bovill* vs. *Cowan*, L. R., 5 Ch. App., 495.

Possession of the agent is possession of the principal, and production will be enforced of document held by the solicitor or agent of a party exclusively for his principal—*Reid* vs. *Langlois*, 1 Mac. and G., 627; *Edmonds* vs. *Lord Foley*, 30 Beav., 282. See section 131 of the Evidence Act.

By section 163 of the Evidence Act, when a party calls for a document, and such document is produced in Court and inspected, the party producing it can compel him to put it in evidence; and by section 164 if a party refuse to produce he cannot afterwards use it in evidence without the consent of the party calling for it.

Notice to produce for inspection documents referred to in plaint, &c.

131. Any party to a suit may at any time before or at the hearing thereof give notice through the Court to any other party to produce any specified document for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof.

Consequence of non-compliance with such notice.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

Judicature Acts, Order 31, Rule 14. See Evidence Act, section 164. This section applies to H. C. and M. S. C. C.

Party or Pleader.—This would probably include a party, his authorized agent, his pleader, or his solicitor—*Williams* vs. *Prince of Wales*, Ass..Co., 23 Beav., 338; see *in re Credit Company*, 11 Ch. Div., 256; but not a co-defendant—*Barbley* vs. *Barbley*, 1 Drew, 233, nor a relative—*Summerfield* vs. *Pritchard*, 17 Beav., 9. And when mere inspection of the party or his pleader without the assistance of persons possessed of a professional knowledge would be useless, a special application shewing the grounds on which it is based should be made—*Swansea Vale Railway Co.* vs. *Budd*, L. R., 2 Eq., 274; *Lindsay* vs. *Gladstone*, L. R., 9 Eq., 132.

His own title.—See notes under sections 125, 130, *supra*.

If the party on whom the notice is served should answer in the manner prescribed in section 132, he should object to produce such documents as he considers he ought not to produce, leaving his adversary to get an order for inspection under section 133.

Party receiving such notice to deliver notice when and where inspection may be had.

132. The party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the Court to the party giving the same a notice stating a time within three days from such delivery at which the documents, or such of them as he does not object to produce, may be inspected at his pleader's office or some other convenient place, and stating which, if any, of the documents he objects to produce, and on what grounds.

Judicature Acts, Order 31, Rule 16. This section applies to H. C. and M. S. C. C.

Convenient Place.—When parties enter into a contract intending that it should be performed at or near the place where the party to perform it carries on his principal business and keeps his books, then if general inspection of these books be sought in action brought against that party, it should ordinarily, if the defendant requires it, be taken at the place where he keeps his books—*Kevaldas Sakar Chand* vs. *Pestonji Nasservanji*, I. L. R., 5 Bom., 467.

Application for order of inspection.

133. If any party served with notice under section 131 omits to give notice under section 132 of the time for inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the Court for an order of inspection.

Judicature Acts, Order 31, Rule 17. This section applies to H. C. and M. S. C. C.

Application to be founded on affidavit.

134. Except in the case of documents referred to in the plaint, written statement or affidavit of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit shewing (*a*) of what documents inspection is sought, (*b*) that the party applying is entitled to inspect them, and (*c*) that they are in the possession or power of the party against whom the application is made.

Judicature Acts, Order 31, Rule 18. This section applies to H. C. and M. S. C. C.

This section only gives a right to such documents as the party has a *primâ facie* right to inspect and does not enlarge the ordinary rule—*Mullock* vs. *Heath*, Weekly Notes, 1875, p. 201.

Power to order issue or question on which right to discovery depends to be first determined.

135. If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, and if the Court is satisfied that the right to such discovery or inspection depends on the determination of any issue or

question in dispute in the suit, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection, the Court may order that the issue or question be determined first and reserve the question as to the discovery or inspection.

Judicature Acts, Order 31, Rule 19. This section applies to H. C. and M. S. C. C.

Consequences of failure to answer or give inspection.

136. If any party fails to comply with any order under this chapter, to answer interrogatories or for discovery, production or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered;

and the party interrogating or seeking discovery, production or inspection may apply to the Court for an order to that effect, and the Court may make such order accordingly.

Any party failing to comply with any order under this chapter, to answer interrogatories or for discovery, production or inspection, which has been served personally upon him, shall also be deemed guilty of an offence under section 188 of the Indian Penal Code.

Judicature Acts, Order 31, Rule 20. This section applies to H. C. and M. S. C. C.

A case will not be dismissed or a defence struck out unless as a last resort—Weekly Notes, pp. 201-2; but, where defendant failed to answer interrogatories, and was allowed another week and again failed, Quain, J., said that the rule was inserted purposely to prevent procrastination, and made an order to strike out the defence unless the answer were filed within twenty-four hours—*Twycroft* vs. *Grant*, Weekly Notes, 1875, p. 229.

A and his wife B, trading under the name of Barrow & Co., sued C, who served them with an order for production; B alone made an affidavit of documents, A having meanwhile absconded. On an application to dismiss the suit, the Vice-Chancellor held that this section did not make it imperative to dismiss the suit, and allowed B, the wife, to carry on the case—*Hartley* vs. *Owen*, Weekly Notes, 1876, p. 193.

Court may send for papers from its own records or from other Courts.

137. The Court may of its own accord, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Every application made under this section shall (unless the Court otherwise directs) be supported by an affidavit of the applicant or his pleader, shewing how the record is material to the suit in which the application is made, and

that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

Nothing contained in this section shall be deemed to enable the Court to use in evidence any document which under the Indian Evidence Act, 1872, would be inadmissible in the suit.

Act VIII, 1859, section 138, Ind. Jur., N. S., 283. This section applies to H. C. and M. S. C. C., and P. S. C. C.

This section applies to Appellate Courts—*Juggernath Sahoo* vs. *Syud Mahomed Hossein*, 15 W. R., 173.

In its discretion.—The Court is not now bound to send for a record: this was an unsettled point under the previous Code—*Heeramun Roy* vs. *Cazee Tahoour Enam*, 7 W. R., 109; *Rughoonath Bose* vs. *Oomed Ali*, W. R., Sp. No., 177. In exercising the discretion allowed him, a Judge should first determine whether the document required is the record of a suit or proceeding in *another* Court: he cannot send for official papers to a public office as he could under the old law—*Juggernath Sahoo* vs. *Syud Mahomed Hossein*, 15 W. R., 173; and apparently the only means of enforcing the production of such documents is by summons on the proper officer—*Sobbee Jha* vs. *Shosheenath Jha*, 15 W. R., 150. Then he should see whether the applicant had exhausted the other means he might have had of obtaining the document he requires. He should not, however, refuse the application merely because in his opinion the document can not be produced before the termination of the trial—*Krishna Churn Baisack* vs. *Protab Chunder Surma*, I. L. R., 7 Cal., 560. Plaintiff appealed on the ground that the lower Court had erred in not sending for original documents filed in another suit which were essential to his case since copies could not be attested by the subscribing witnesses; it was held that he should have applied under section 136, Act VIII of 1859, to the Court in possession of the document, to have them returned, on depositing, if necessary, properly attested copies with the record, before he applied under this section—*Louis Coraah* vs. *Gooroo Churn Ghose*, 18 W. R., 13; see also *Moni Mohinee Dabee* vs. *Greedahma Churn Rannah*, 14 W. R., 302.

Query.—Is the Court of Wards a Court under this section—*Sobbee Jha* vs. *Shosheenath Jha*, 15 W. R., 150.

A Judge should pass a distinct order on the application: the words "nuthishamel pesh" are not sufficient—*Romun Kishen Dey* vs. *Shaikh Kadir Buksh*, 6 W. R., 79; for, if the documents are important, and there is nothing on the record to shew that the application has been refused, or the documents have been sent for and considered, the case may be remanded—*Ram Runjan Chuckerbutty* vs. *Gopee Bullub Chuckerbutty*, 18 W. R., 127.

The Judge sending for the record cannot use in evidence documents inadmissible under the Evidence Act—*Narappa* vs. *Gapaya*, 2 Bom., 341; nor need he send for the whole record, but only such papers as are contained in the application—*Mussamut Janokee Beebee* vs. *Shah Habeebul Hossein*, W. R., 1864, p. 272; and in all cases the party for whose benefit the documents have been used should be required to file copies on the record—*Narappa* vs. *Gapaya*, 2 Bom., 341.

A Court has no discretion to refuse to send records which have been demanded under this section—*In the matter of Golap Coomary Dossee*, 4 C. L. R., 36.

Documentary evidence to be in readiness at first hearing.

138. The parties or their pleaders shall bring with them and have in readiness at the first hearing of the suit, to be produced when called for by the Court, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been

filed in Court, and all documents which the Court at any time before such hearing has ordered to be produced.

This section applies to H. C. and M. S. C. C.

By section 59, *supra*, if plaintiff sues or relies on a document, he must either produce it with his plaint, or enter it in the list attached to it. By section 63, any document which has not been produced or entered, cannot be received in evidence without leave of the Court—See *Promsook Chunder* vs. *Rajkisto Mitter*, 1 Hyde, 145; *Ranee Roshun Jehan* vs. *Syed Inayut Hosein*, Marsh., 127; and by this section the parties must bring with them and have in readiness at the first hearing all the documentary evidence within their power and on which they rely, and file it, if called on, after the issues have been settled. If not called on they are not bound to file it then—*Mahbub Hossein* vs. *Patasu Kumari*, 1 B. L. R., 120. But if, during the course of a trial, something new were brought to light, and an additional issue were framed, the parties would not be entitled to shut out good and valuable evidence of whose genuineness there could be no doubt, merely because the other parties had, without good and assignable cause, abstained from bringing it before the Court on the first hearing—*Syed Ikram Hossein* vs. *Ram Lochun Dutt*, 23 W. R., 29. So a Court may receive in evidence a document not filed with the plaint on being satisfied of its genuineness even though unstamped—*Attaoollah Mundle* vs. *Sakcooddeen Tarufdar*, W. R., 1864, p. 271.

The mere admission of further evidence after the first hearing is not a good ground for appeal—*Goshain Tota Ram* vs. *Rajah Rickmunjee Bullub*, 12 W. R. (P. C.), 32; nor can an Appellate Court reject evidence admitted by the first Court, simply on that ground—*Hanooman Singh* vs. *Fell*, 4 Agra, 148: but the other party may contest the propriety of the order of admission when appealing from the final decree—*Bhoom Narain Sing* vs. *Kurmoon Ali*, 1 W. R., 198.

There has been a material change made in the previous law. Section 128, Act VIII, ran as follows: "No documentary evidence of any kind which the parties or any of them may desire to produce, shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at the first hearing." The present section has the limiting words "power and possession," and it is probable from the following circular on the previous section that their effect will be to greatly limit its scope:

"This hearing, it will be observed, is the defendant's first opportunity (and the last, unless good cause be shewn) for production of documentary evidence. It is also an opportunity (and the last, unless good cause be shewn) for the plaintiff, with the sanction of the Court, to produce any documents which he may not have produced in Court with his plaint.

"A plaintiff occasionally has to prove his case, or a defendant to substantiate his defence to a suit, by documents in the possession or power of some other party to the suit" which documents of course cannot be produced by the party whose case they are to serve.

"When this is the position of the plaintiff, he may, under section 40 (and ordinarily he ought), 'at the time of presenting the plaint, deliver to the Court a description of the document, in order that the defendant may be required to produce the same; 'when this is done, the summons (*vide* section 43) is to 'order the defendant to produce any written document in his possession or power, of which the plaintiff demands inspection, or upon which the defendant intends to rely in support of his defence;' and where the production of such document is required by a defendant, or when the demand has not been made under sections 40 and 43 on the part of the plaintiff, section 107 provides that 'he shall at the earliest opportunity deliver to the Court two notices in writing to the party in whose possession or power he believes the document, writing, or other thing to be, calling upon him to produce the same; and one of such notices shall be filed in Court, and the other shall be delivered by the Court to the nazir or other proper officer, to be served upon such party.'

"When such notices have been served within a reasonable time before the hearing of the suit, the party served is required by section 128 to produce the documents therein specified at the hearing.

"A party to the suit, or any other person, may also be summoned to produce a document (section 153) if necessary, and the Court has power, under section 170, to deal with persons being parties to the suit who fail to comply with orders to produce documents.

"It follows from these several sections that documentary evidence is to be produced in open Court; that it must be produced at the earliest opportunity, and not afterwards

without the special sanction of the Court, or without good cause shewn; and that, where the production of such evidence rests with a party other than the party requiring it, the Court is bound, on application made to it in reasonable time, to afford its aid in enforcing the production of such evidence, and it is the duty of all Judges to take care, as far as their Courts are concerned, that these principles are observed."—7 W. R., Civ. Cir., 4.

Effect of non-production of documents.

139. No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of section 138, shall be received at any subsequent stage of the proceedings unless good cause be shewn to the satisfaction of the Court for the non-production thereof. And the Judge receiving any such evidence shall record his reasons for so doing.

This section applies to H. C. and M. S. C. C.

The parties are not entitled to adduce fresh documentary evidence after the issues in the case have been settled, if it has been in their power or possession; but they may tender it subsequently, stating the grounds upon which it was not tendered at an earlier stage, and it remains for the Judge to admit or reject the application. In either case the grounds on which he acts should be stated on the record, and must be so stated if the evidence is received—*Watson & Co.* vs. *Kunhye Bahadoor*, 9 W. R., 294. In dealing with applications under this section, it should be borne in mind that the main object of it is to prevent the fabrication of evidence during the trial, to meet those unexpected questions which sometimes arise, that it is limited to documents within the power or possession of the parties, and that it never was intended to allow, without leave, the production of any more documentary evidence than had been already filed at the first hearing—*Gour Huree Chowdhry* vs. *Pran Huree Laha*, 21 W. R., 42. But the Court should call upon the parties to produce, or else the *stringent* terms of the following sections will not be enforced. Where a party who had not been called on by the Court, tendered documentary evidence the day after the issues had been framed, and there was nothing in the statement drawn up when fixing the issues, shewing that any documents had been called for, it was held the evidence should have been received—*Mahbub Hossein* vs. *Patasu Kumari*, 1 B. L. R., 127.

Documents to be received by Court.

140. The Court shall receive the documents respectively produced by the parties at the first hearing, provided that the documents produced by each party be accompanied by an accurate list thereof prepared in such form as the High Court may from time to time direct.

Rejection of irrelevant or inadmissible documents.

The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

This section applies to H. C. and M. S. C. C.

The Judge, having called on the parties to produce their documentary evidence, must receive every document tendered by the parties; and, having inspected them, return such as he considers evidently irrelevant or inadmissible—*Ranee Roshun Jehan* vs. *Syed Inayut Hossein*, Marsh., 127; or, if for want of time he is unable to inspect or consider them, he may allow them to be filed, and inspect and reject them afterwards—*Soodukhina Chowdhrain* vs. *Raj Mohun Bose*, 11 W. R., 350. The documents retained by the Court cannot be used in evidence or put on the record until properly proved or admitted as provided in section 141, *infra*.

No appeal lies from an order rejecting documents, nor can it be interfered with under the Charter Act—In the matter of *Erskine*, Petitioner, 18 W. R., 511; but it may be impugned on appeal from the final decree.

Where any thing must be done to obtain a document, it must be done by the party requiring it. Thus the party, and not the Court, must obtain the sanction of Government to an officer in the Telegraph Department disclosing the purport of a message that passed through his office—*Lekhraj* vs. *Pale Ram*, 2 Alla., 210.

141. No document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force. Every document so proved or admitted shall be endorsed with the number and title of the suit, the name of the person producing it, and the date on which it was produced. The Judge shall then endorse with his own hand a statement that it was proved against or admitted by (as the case may be) the person against whom it is used. The document shall then be filed as part of the record:

No documents to be placed on record unless proved.

Proved documents to be marked and filed.

Provided that, if the document be an entry in a shop-book or other book, the party on whose behalf such book is produced may furnish a copy of the entry, which may be endorsed as aforesaid, and shall be filed as part of the record, and the Court shall mark the entry, and shall then return the book to the person producing it.

Entries in shop-books.

All documents produced at the first hearing and not so proved or admitted shall be returned to the parties respectively producing them.

This section applies to H. C. and M. S. C. C.

No document should be filed without being properly endorsed, so that it may be known by whom it has been produced—*Ranee Rajessuree Koonwar*, 6 W. R., 1; *Watson* vs. *Redwell*, 11 Ch. Div., 153. As regards books, this section seems somewhat inconsistent with the direction contained in section 62, *supra*, namely, that if the exhibit or document be an entry in any shop-book or other book, the party on whose behalf such book is produced shall produce a copy of the entry, which copy shall be endorsed as aforesaid, and be filed as part of the record, and the book shall be returned to the party producing it. The Court ought doubtless, in cases under this section, as under section 62, to mark the document, *i. e.*, the entry in the book, for the purpose of identification before returning it. It will be observed that the words of this section and section 62 as to the return of the book are imperative, and that under section 62 the party has not the option of delivering the book to be filed instead of a copy of the entry—See 7 W. R., Civ. Cir., 7, approved of by the Privy Council in *Maharanee Brojosoondery Debea* vs. *Ranee Luchmee Koonwaree*, 20 W. R., 95.

It would appear from *Soondur Monee Debia* vs. *Kripa Moyee Debia*, 21 W. R., 112, that the Judge should fix a time for returning the documents rejected.

Practice.—In dealing with documentary evidence, the substantial principles on which the authenticity and value of evidence rest should be observed by the Judge—*Rama Lakshmi Ammal* vs. *Sivanantha Perumal Sethurayar*, 14 Moore, 588; he should not, for instance, accept secondary evidence without a sufficient reason why the original has not been produced—*Id*; *Ramgopal Roy* vs. *Gordon Stuart*, 14 Moore, 461; *Syud Abbas Ali* vs. *Yadeem Ramy Reddy*, 3 Moore, 156; nor documents as proved, because they have not been denied by the opposite party—*Kirteebash Mayetee* vs. *Ramdhun Khoria*, B. L. R. F. B., 659; *Reazoonissa* vs. *Booko Chowdhrain*, 12 W. R., 267; and if documents which have not been proved but simply filed as often happens in the mofussil, the Judge should pass over them as unproved, although it is the duty of the pleader for the opposite party to insist that they should not remain on the record at all—*Kallidas Pershad Dutt* vs. *Ram Hari Chuckerbutty*, I. L. R., 5 Cal., 317; and where in the course of argument on appeal certain letters were tendered in evidence, which not been marked or noted in the judgment, it was held they were not admissible, as no documents, though admitted in the answer to the notice to admit, were

evidence, unless put in at the trial, and formally marked by the Registrar—*Watson* vs. *Rodwell*, 11 Ch. Div., 153. But if the opposite party when called on states that he is not prepared to deny their genuingness, it appears they may be accepted without formal proof—*Indro Bhoosun Deb Roy* vs. *Goluck Chunder Chuckerbutty*, 12 W. R., 350; and if the plaint and issues assume a document to have been executed and raise questions depending only on that assumption it need neither be proved nor filed—*Burjorji* vs. *Muncherji*, I. L. R., 5 Bom., 143. Unstamped documents or secondary evidence of them should not be received without payment of the stamp and penalty—*Haran Chunder Bhooree* vs. *Russick Chunder Neogy*, 20 W. R., 63; but if such evidence has been admitted in the first Court, it cannot be rejected by the Appellate Court. Nor will it form a good ground for special appeal. See note on section 140 *ante*.

An unregistered document, which does not operate as a conveyance, is admissible in a suit for specific performance—*Burjorji* vs. *Muncherji*, I. L. R., 5 Bom., 143.

If a document appears to have been altered, the onus of proving its genuineness lies on the party claiming under it. If he can shew the nature of the document in its original state, and account for the alteration, it is admissible. Thus, where a deed was tampered with, while in the custody of the record-keeper, their Lordships of the Privy Council admitted it, saying: "It may be conceded that in an ordinary case the party who presents an instrument which is an essential part of his case in an apparently altered and suspicious state must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document. Moreover, the peculiarity of the present case is that one of the issues to be determined is, what was the condition of the document when first produced by those who claim under it. The appellants may fairly contend that the rule above stated is not applicable to them until the question has been decided against them"—*Mussamut Khoob Konwur* vs. *Baboo Moodnarain Singh*, 9 Moore, 17.

Translations.—The High Court allowed the interpreter sometimes to translate a vernacular document *vicâ voce* when the expense of translation would be very great and the necessity of a translation had arisen from unforeseen circumstances—*Sereavy Mistree* vs. *Cally Kinker Paulet*, Fulton, 22.

Rejected documents to be marked.

142. When a document so proved or admitted is relied on as evidence by either party, but the Court considers it inadmissible, it shall be further endorsed with the addition of the word "rejected," and the endorsement shall be signed by the Judge.

and returned.

The document shall then be returned to the party who produced it.

This section applies to H. C. and M. S. C. C.

Court may order any document to be impounded.

143. Notwithstanding anything contained in sections 62, 141 and 142, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court think fit.

This section applies to H. C. and M. S. C. C.

When document admitted in evidence may be returned.

144. In suits in which an appeal is not allowed, when the suit has been disposed of, and in suits in which an appeal is allowed, when the time for preferring an appeal from the decree has elapsed, or, if an appeal has been preferred, then after the appeal has been disposed of, any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit, and placed on the record, shall, unless the document is impounded under section 143, be entitled to receive back the same:

When document may be returned before time limited.

Provided that a document may be returned at any time before either of such events, if the person applying for such return delivers to the proper officer a certified copy of such document to be substituted for the original:

Copies should only be taken under this paragraph when the case is still pending—*Parbutty Churun Roy*, Petitioner, 8th of September 1860.

Certain documents not to be returned.

Provided also that no document shall be returned which, by force of the decree, has become void or useless.

Receipt to be given for returned document.

On the return of a document which has been admitted in evidence, a receipt shall be given by the party receiving it, in a receipt-book to be kept for the purpose.

These sections apply to H. C. and M. S. C. C.

Provisions as to documents applied to material objects.

145. The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

This section applies to H. C. and M. S. C. C.

CHAPTER XI.

OF THE SETTLEMENT OF ISSUES.

Framing of issues.

146. Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

Material propositions are those propositions of law or fact which a plaintiff must allege in order to shew a right to sue.

Each material proposition affirmed by one party and denied by the other must form the subject of a distinct issue.

Issues are of two kinds: (*a*) issues of fact, (*b*) issues of law.

At the first hearing of the suit, the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to the Court to depend.

When issues both of law and of fact arise in the same suit, and the Court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Nothing in this section requires the Court to frame and record issues when the defendant at the first hearing of the suit makes no defence.

This section applies to H. C.

The Law gives no power to summon the opposite party to give evidence on the settlement of issues—*Anund Chunder Banorjee* vs. *Woomess Chunder Roy*, 1 Hyde., 147.

Allegations from which issues may be framed.

147. The Court may frame the issues from all or any of the following materials:—

(*a*) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons;

(*b*) allegations made in the plaint or in the written statements (if any) tendered in the suit, or in answer to interrogatories delivered in the suit;

(*c*) the contents of documents produced by either party.

This section applies to H. C.

When fixed.—If both parties appear, so that the Court can ascertain from them the points in dispute, issues should be recorded; but if they do not appear, it is impossible to determine what portion of the case is admitted, and what portion is disputed, and no issue can be fixed—*Ameer Ali Sowdagur* vs. *Imamooddeen*, 15 W. R., 145. Where a title is put forth and not denied, the effect of the omission to deny now appears to be the same as if the party omitting to deny the title admitted it. Thus, where plaintiffs claimed as sudder putneedars and this claim was not denied, it was held that they were not bound to prove their title—*Chundee Churn* vs. *Mobaruck Ali*, 12 W. R., 469; and where plaintiff claimed under certain mortgages, and the defendant confined himself to saying that "the mortgages created by those bonds are insufficient and unjust" and did not move the Court to raise an issue as their *bonâ fides*, it was held that the mortgages were *bonâ fide* transactions, Couch, C. J., said: "If the defendant really intended by this portion of his written statement to raise such a question, he might have requested the Lower Court to frame an issue upon it. The plaintiff would then have had notice of such a question being raised, and might have produced evidence upon it and satisfied the Court that the mortgages were *bonâ fide*

transactions. As no such issue was raised at the first hearing, we must take it that such a case was not put forward by the defendant so as to make it necessary for the plaintiff to give any evidence on the point. It was said by the Judicial Committee, in a suit tried before the Code of Civil Procedure (*Anund Moyee Chowdrain* vs. *Sheeb Chunder Roy*, 2 W. R., P. C., 19; 9 Moore, 301) that they cannot apply the strict rule that averments not traversed must be taken to be admitted; but where in a suit under the Code issues have been settled, averments upon which no issue is framed, should be taken to be admitted, as the Court before proceeding to frame and record the issues, is directed to enquire and ascertain upon what question of law or fact the parties are at issue"—*Mussamut Ahmedee Begum* vs. *Dabee Persaud*, 18 W. R., 287. And in general it may be laid down that only such averments should be made the subject of issues as are essential to support the cause of action and are denied by the defendant, or as are essential to support a plea and are denied by the plaintiff —*Birch* vs. *Furzind Ali*, 3 Alla., 303. But see *Bhoobun Chunder Shome* vs. *Ram Dyal Shaunt*, 14 W. R., 55.

At any time before decree the Court may frame an additional issue embracing matter not included in the plaint but not inconsistent with it or with the prayer thereof—*Modhe* vs. *Dongre*, I. L. R., 5 Bom., 609.

How framed.—The plaint and written statements are the pleadings in a suit, and issues may be framed on them—*Kissen Lall* vs. *Lalljeemul*, 1 Ind. Jur., N. S., 364: but the Courts are not bound rigidly to adhere to the allegations set forth in them, where the real points in dispute are often missed by bad drafting—*Apaya* vs. *Rama*, I. L. R., 3 Bom., 210; but may frame the issues from the allegations made by the parties orally or otherwise—*Reid* vs. *Mahamad Luman Khan*, S. D., N. W., 1803, p. 622; or from the statement of their pleaders—*Elahee Buksh Khan* vs. *Nawab Golam Mahomed Khan*, S. D., N. W., 1865, p. 1; *Mussamut Kowsullya Dossee* vs. *Ram Juggurnath Dey Sircar*, 8 W. R., 162; or from the answers to the questions, put by the Court to elicit the material facts—*Dhun Singh Roy* vs. *Chunder Kant Mookerjee*, 4 W. R., Act X, 43; *Modhe* vs. *Dungre*, I. L. R., 5 Bom., at 614, although the plaint may by itself disclose no cause of action—*Man Gobind Sircar* vs. *Umbica Monee Dossia*, 16 W. R., 218; *Moulvie Abdoollah* vs. *Shaha Majeesooddeen*, 15 W. R., 286; or the real facts may differ from the statements contained in the plaint or written statements or have not appeared in them—*Sahebzadee Begum* vs. *Mirza Himmut Bahadoor*, 12 W. R., 512; *Soonder Narain Pandah* vs. *Shaikh Namdar*, 21 W. R., 407; provided the state of facts and equities there set up are not inconsistent with the pleadings—*Bizjee Bibee* vs. *Monohur Doss*, 2 Ind. Jur., N. S., 118; *Eshan Chunder Singh* vs. *Shamachurn Bhutto*, 6 W. R. (P. C.), 57; *Wooma Soonduree Dossee* vs. *Dwarkanath Roy*, 11 W. R., 72. And if a Court goes beyond the rights which are properly in issue between the parties the decree of the Court is absolutely null and void—*Robinson* vs. *Duleep Singh*, 11 Ch. Div., 813. If both parties have agreed to abide by certain issues, they are bound by them—*Shew Sukoy Lall* vs. *Syud Wajed Ali Khan*, 13 W. R., 205; *Moondur Bibee* vs. *Hunooman Pershad*, 11 W. R., 277; *Beer Chunder Joobraj* vs. *Tarinee Chunder Roy*, 11 W. R., 20; so much so that when a defendant, pleading limitation, rested it on the fact that he had been 12 years in possession, he was held barred in special appeal from saying that it did not dispose of the question of limitation—*Kisto Mohun Karmokar* vs. *Noyan Tara Dossea*, 10 W. R., 389. As to the changes allowed, see note under section 53.

Issues.—When a plaintiff relies on a lease, the genuineness of which is disputed, the issue must be whether it is genuine or not—*Thakooranee Dossee* vs. *Goluck Chunder Biswas*, 5 W. R., 157; in a suit for a kaboolyat of 25 parcels of land, the defendant alleged that he only held three and those not as plaintiff's ryot, the issues were held to be (1) whether the ryot was in possession of only three or more than three parcels in the lands in question; and (2) whether plaintiff was entitled to receive a kaboolyat for all or any of those parcels—*Radha Kishore Talookdar* vs. *Goluck Chunder Roy*, 11 W. R., 366; and where a cultivator sued his landlord to pay less rent than had been assessed by a Sub-Collector in an order A, and to obtain a refund, and the Judge fixed an issue whether the defendant was entitled to rent at the rate specified in A, it was held that the proper issue should have been what was a fair and reasonable rate of rent—*Kutty Subramaniya Tambiran* vs. *Chinna Muttu Pillai*, 3 Mad., 25; in a suit for rent where defendant pleads a lakheraj title, the issue is not whether defendant's title is good but whether plaintiff has ever received rent—*Purbooddeen Mullick* vs. *Molaem Bibee*, 14 W. R., 149. In a rent suit defendant denied that he held under plaintiff, and alleged that the jote belonged to two persons; that he, defendant, purchased the rights of one of them under a decree sale, and subsequently obtaining a sub-lease from the second sharer, he was liable to pay him and not plaintiff, it was held that the issues were (1) whether defendant held in succession to the previous tenant, or the jote really belonged to two persons; (2) if so, if any decree had been passed against one of those persons under which the rights of

that tenant alone could have been and were sold; (3) and whether consequently the defendant had acquired the jote or a portion of it only, and if he held the entire jote he would be liable—*Missleback* vs. *Luchmee Narain*, 17 W. R., 504; in a suit by mortgagees in possession the proper issue is the terms of the mortgage and not previous possession unless limitation is raised—*Khoob Chund* vs. *Uchul Singh*, S. D., N. W., 1862, p. 87; in a suit on an account admitted as correct, the issue is whether the accounts have been admitted, and not whether they are correct—*Pransookh* vs. *Ramzan Khan*, S. D., N. W., 1863, p. 300; and where A and B were sued as agents, for moneys received on behalf of their principal and they pleaded payment, the issue was whether they had paid—*Bykant Nath Sandyal* vs. *Kalee Churn Paul*, 17 W. R., 149; and in a suit for instituting a suit against another, the issues are whether the former complainant acted maliciously and without probable cause—*Ram Buddun Singh* vs. *Sirdar Dyal Singh*, 17 W. R., 101. If fraud is averred the issue should be raised—*Sheo Churn Singh* vs. *Chukraree Pershad Narain Singh*, 15 W. R., 436. When a suit was brought against the defendant as the representative of a person deceased, and the Courts below found that the amount was due, but that the defendant had not taken possession of any property of the deceased person; *Held*, the Court should have determined the further question whether the defendants were legal representatives of the deceased and entitled to his estate—*Aval Khadar* vs. *Ardhu Set*, 2 Mad., 423.

As to the proper issues in a suit to establish an easement by prescription when limitation is pleaded under section 26, Act XV of 1877, See *Achal Mahta* vs. *Rajur Mahta*, I. L. R., 6 Cal., 812; and in case of a presumed grant, see *Rajrup Koer* vs. *Abul Hossein*, I. L. R., 6 Cal., 394; *Punja Kuvarji* vs. *Bai Kuvar*, I. L. R., 6 Bom., 20.

Between whom.—No issue can be raised between co-defendants—*Degumber Mitter* vs. *Khettur Mohun Mitter*, 2 W. R., 45: and the decision of issues between plaintiff and two defendants claiming under opposite titles is not decisive as between the defendants—*Kali Kinkur Bachasputty* vs. *Kristo Mungul Bhuttacharjee*, 11 W. R., 462.

Omission to settle issues.—The omission to settle issues is not fatal to the trial of the suit if it appears that the necessary points have been raised and discussed —*Katchekalyana Kalaka Tola Oodiar* vs. *Kuchivijaya Rungappa Kalakka Tola Oodiar*, 12 Moore, 495; and where both parties invoked the decision of the Court upon a question raised by the pleadings and the question was argued, it was held that the judgment upon it was not *ultra vires*, because an issue was not framed embracing the whole question—*Soorjomanee Dayee* vs. *Suddanaund Mohapattar*, 20 W. R., 377; and so if the parties have gone to trial, well knowing what the real question is between them, and evidence has been taken the error is not fatal—*Mussamut Mitna* vs. *Syud Fazl Rub*, 13 Moore, 573; 15 W. R. (P. C.), 15; and especially so when this procedure has been adopted without objection—*Mahomed Basiroollah Bhoonia* vs. *Ahmed Ali*, 22 W. R., 448; but if the case is complex, and a settlement of issues is considered necessary, the case may be remanded on appeal for a new trial after settling and recording the points in dispute—*Rewan Pershad* vs. *Jankee Pershad*, 11 Moore, 25; *Jogeshur Rae* vs. *Doolun Rae*, 2 Alla., 183; *Nilatatchi* vs. *Venkatachala Mudali*, 1 Mad., 131.

Appellate Courts.—If the first Court has fixed and tried the wrong issues, the Appellate Court should lay down the proper issues, unless the issues decided have been agreed on by the parties—*Beer Chunder Joobraj* vs. *Tarinee Chunder Roy*, 11 W. R., 20; or have been sufficient to dispose of the matters raised in the pleadings—*Bhoobun Mundul* vs. *Belash Money Dassee*, 1 Shome, 138; or the new issues would be a complete departure from the case set up in the Lower Court—*Punchanun Roy* vs. *Toyluckho Mohenee Dossee*, 14 W. R., 466. Where a new and different issue has been raised, it ought to be done in such a way as to give the parties the fullest opportunity of producing evidence upon it, because if it is at all likely that, in consequence of the issues in the first Court, the parties were induced to abstain from giving evidence, it would not be right to decide against them on account of the want of evidence—*Latoo Mundul* vs. *Bhoobun Mohun Chatterjee*, 17 W. R., 361; *Ram Persaud Dutt* vs. *Kristo Mohun Shaw*, 18 W. R., 297; and properly speaking the Judge should, with some degree of formality, frame the issues and record whether the parties had desired to offer any evidence on them; but whether this is done or not, the pleaders should take care to move the Appellate Court that they may be allowed to tender evidence, otherwise the losing party may possibly be debarred from urging in special appeal that he had been misled by the issues laid down by the first Court—*Eshan Chunder Sein* vs. *Shaikh Dhonaye*, 11 W. R., 61. See, however, *Latoo Mundul* vs. *Bhoobun Mohun Chatterjee*, 17 W. R., 362. In a suit for possession of land, where plaintiff described himself as the son of B, and defendant alleged that the land never belonged to B, but had been settled in the name of an idol and was then in possession of S, under

whom he (defendant) held it under a lease and mortgage deed; and the plaintiff on the day on which the suit was finally disposed of petitioned that he was the son of S, and was allowed to amend his plaint, it was held that the Court should not have disposed of the case on that day, but should have framed issues and allowed the defendants every opportunity to produce evidence—*Doorga Narain Bose* vs. *Brojo Kishore Ghose*, 23 W. R., 172.

In no case should an Appellate Court set aside a decision of the Lower Court on a point which, though essential, has not been raised in it, without framing an issue on the point and properly deciding it—*Mahomed Rasid Khan Choudhry* vs. *Jadoo Mirdha*, 20 W. R., 401.

Court may examine witnesses or documents before framing issues

148. If the Court be of opinion that the issues cannot be correctly framed without the examination of some person not before the Court, or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, to be fixed by the Court, and may (subject to the rules contained in the Indian Evidence Act) compel the attendance of any person or the production of any document by the person in whose hands it may be, by summons or other process.

This section applies to H. C.

Power to amend, add and strike out issues.

149. The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

This section applies to H. C.

The power of amending issues under this section is almost the same as the power of amendment given to Judges in England by section 222 of the Common Law Procedure Act of 1852—*Nehera Roy* vs. *Rajah Radha Pershad Singh*, 4 C. L. R., 353, I. L. R., 5 Cal., 64.

Instead of dismissing the suit for any error in the plaint the proper plan is to amend the issues whenever it appears necessary, so as to raise the real questions in difference between the parties—*East Indian Railway Co.* vs. *F. J. Jordan*, 14 W. R., O. A., 11; *Shookoomar Singh* vs. *Cruise*, 6 W. R., Act X, 105; and where after the evidence of both parties had been taken, the principal defendant applied to file an amended written statement which raised a new defence, it was held that the Court was bound to receive it if it embraced the real question between the parties and to have amended the issues—*Bolye Meah* vs. *Khetoo Gorai*, 20 W. R., 208; but see *Baboo Lall* vs. *Ram Narain Ram*, Coryton, 8, where it is stated that when there has been a hearing and settlement of issues, the Court will not exercise its discretionary power to raise a new issue except on clear proof of inadvertence or mistake or the discovery of new matters affecting the merits, and that such matter was not within the knowledge of the parties at the date of the former settlement of issues. And see also *Douglas* vs. *The Collector of Benares*, 5 Moore, 290. And in *Nehara Roy* vs. *Rajah Radha Pershad Singh*, 4 C. L. R., 353, it was held that a Judge is not bound as a matter of law, to raise an issue on a point not disclosed in the pleadings, even though it be a point of jurisdiction. The Court is not bound to try the suit in the manner in which the plaint is framed, for its object is merely to bring the matter in dispute between the parties before the Court; but on the settlement of

issues the Judge is to ascertain the question—*Arbuthnot & Co.* vs. *Betts*, 14 W. R., 181; yet if a plaint and its proof lead to particular issues, the Court is bound to raise them and give relief, provided they do not come by surprise on the defendant—*Obhoy Churn Mullick* vs. *Womesh Chunder Paul*, 2 Hyde, 263; *Muzboot Sing* vs. *Mussamut Chunder Mashee Kooer*, 16 W. R., 44; but see *Deewan Dyashunker* vs. *Ameenooddeen Khan*, 4 Agra, 246, if they are fairly within the scope of the pleadings—*Kishun Pershad* vs. *Bhawanee Deen*, 1 Agra, 47; or not inconsistent with them—*Eshan Chunder Sing* vs. *Shama Churn Bhuttoo*, 6 W. R. (P. C.), 57; *Sharoda Koomaree Dossee* vs. *Mohinee Mohun Ghose*, 20 W. R., 272; and the cases at p. 80, *supra*—*Verasvami Gramini* vs. *Ayyasvami Gramini*, 1 Mad., 471; *Nawab Sidhee Nuzur Ali Khan* vs. *Ojoodhyaram Khan*, 10 Moore, 552. A Court should not record a proceeding declaring its intention to frame additional issues and leave the actual framing for the time of giving judgment—*Kamul Kaminee Dossee* vs. *Obhoy Churn Ghose*, 15 W. R., 151; on the contrary it should frame the issues, and fix a convenient day for their trial, regard being had to the facilities which the parties may have for producing their evidence—*Sreehuree Mundul* vs. *Judoonath Ghose*, 10 W. R., 169.

Issues allowed.—Every matter fairly within the scope of the plaint, if important for the decision of the substantive difference between the parties should be framed into an issue, and the duty of framing them is thrown on the Courts in order to render substantial justice, and to prevent a party suing from being remitted to a new suit, when by a suitable order as to terms upon which amendment shall be made, the Court by framing additional issues can determine in the existing suit the real question in controversy between the parties. Thus where A sued on an account settled and failed to prove the alleged settlement, it was held that the suit should not have been dismissed; but that the Judge should have framed issues with regard to the items composing the account which were not barred and given judgment on the merits—*Kishun Pershad* vs. *Bhawanee Deen*, 1 Agra (F. B.), 47; *Dwarka Doss* vs. *Jankee Doss*, 6 Moore, 88; *Obhoy Churn Mullick* vs. *Womesh Chunder Paul*, 2 Hyde, 263; and where plaintiffs sued as partners, and it appeared on the evidence that two of them only were partners when the cause of action arose, and the Lower Court struck out the other names, it was held that this was wrong, and that the proper course would have been to amend the issues, and raise the question whether the plaintiffs were or were not partners, and if it were found on the amended issue that only two of them were partners when the cause of action arose to have decreed in their favour—*East Indian Railway Co.* vs. *Jordan*, 14 W. R. (O. A.), 11, and so if a suit is brought against two persons, the Court can raise an issue whether one of them is solely liable, and, on finding him solely liable, pass a decree against him—*Banee Madhub Lahoree* vs. *Bipro Dass Dey*, 15 W. R., 69. In a suit for possession, defendant pleaded limitation, but his witness unexpectedly disclosed that he was a mortgagee; it was held that it was the duty of the Court, when the mortgage was disclosed, to frame an issue on the subject—*Muzboot Singh* vs. *Mussamut Chunder Mashee Koer*, 16 W. R., 44; and where a person sued as purchaser, but defendant denied the purchase, and the oral evidence proved the transaction was a mortgage, it was decided that the Court was bound to enquire to it by amending the issues—*Nundo Lall Mitter* vs. *Prosunno Moyee Debia*, 19 W. R., 333.

The issues fixed, and not the pleadings, ought to guide the parties as to production of evidence—*Huro Soonduree Debia* vs. *Ameena Begum*, 5 W. R., Act X, 72. The Judge may dispose of the issues in any order—*Sitanath Doss Chowdhry* vs. *Doyadronath Doss Chowdry*, 23 W. R., 54; but separately if possible—*Umbika Soonduree Dossee* vs. *W. Woodin*, 3 W. R., 226.

Judicial discretion how Exercised.—When a Judge at the settlement of issues has refused to raise a certain issue, the question ought not to be re-opened at the trial by the then presiding Judge—*Bolye Chund Singh* vs. *Moulard*, I. L. R., 4 Cal., 572; see also the case of *Nehora Roy* vs. *Raja Radha Pershad Sing*, 4 C. L. R., 353, I. L. R., 5 Cal., 64; and *Robinson* vs. *Duleep Sing*, 11 Ch. Div., 813.

If the question has not been raised in the plaint, written statement or issues of the first Court, or in the grounds of first appeal, and the evidence has not been directed to it, it should not be raised in special appeal—*Ameerunnissa Khetoon* vs. *Abedeenniss Khetoon*, L. R., 2 Ind. App., 87; but where no issue has been laid down, and the case is complex—*Baboo Rewan Pershad* vs. *Jankee Pershad*, 11 Moore, 25, or the issue though in terms covering the main question does not sufficiently direct the attention of the parties the main question of fact, and a party may have been prevented from adducing evidence—*Oolagappa Chetty* vs. *Arbuthnot*, L. R., 1 Ind. App.,

268; 14 B. L. R., 115; their Lordships of the Privy Council have fixed new issues and remanded the case for trial. See as to amendment of plaint, note under section 57, *ante*.

Questions of fact or law may by agreement be stated in form of issue.

150. When the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing

(*a*) that upon the finding of the Court in the affirmative or the negative of such issue, a sum of money specified in the agreement, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement,

(*b*) that upon such finding some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct, or

(*c*) that upon such finding one or more of the parties shall do or abstain from doing some particular act, specified in the agreement, and relating to the matter in dispute.

This section applies to H. C.

Where the issues are selected and agreed upon by the parties, there is no appeal as to the form of them—*Syud Hadee Ali vs. Mussamut Khorshed Begum*, S. D., N. W., 1851, p. 335.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

151. If the Court be satisfied, after making such inquiry as it deems proper,

(*a*) that the agreement was duly executed by the parties,

(*b*) that they have a substantial interest in the decision of such question as aforesaid, and

(*c*) that the same is fit to be tried and decided,

it may proceed to record and try the issue, and state its finding or opinion thereon in the same manner as if the issue had been framed by the Court;

and may, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement;

and upon the judgment so given, decree shall follow and may be executed in the same way as if the judgment had been pronounced in a contested suit.

This section applies to H. C.

CHAPTER XII.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

If parties not at issue on any question of law or fact.

152. If at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

This section applies to H. C. and M. S. C. C.

If the defendants voluntarily appear in Court and confess judgment, no summons is necessary for their appearance, and the Court should at once give judgment for the plaintiffs—*Bank of Bengal* vs. *Currie*, 3 B. L. R., 403; 12 W. R., 472.

When the plaintiff sues the right person, but serves the summons on another person of a similar name who appears and denies liability the suit should be dismissed with costs—*London, Bombay and Mediterranean Bank* vs. *Mahomed Ibrahim Parkar*, I. L. R., 4 Bom., 619.

If one of several defendants be not at issue with plaintiff.

153. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or fact, the Court may at once pronounce judgment for or against such defendant, and the suit shall proceed only against the other defendants.

This section applies to H. C. and M. S. C. C.

If parties at issue on question of law or fact.

154. When the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court be satisfied that no further argument or evidence than the parties can at once supply is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues,

Court may determine issue,

and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

and pronounce judgment.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them object.

If the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument, as the case requires.

This section applies to H. C. and M. S. C. C.

Parties are at issue.—The Courts are bound to proceed on the facts alleged in the plaint and cannot refuse to try issues of fact upon the merits on the ground of the legal effect of the facts alleged, except on the assumption that they can be and are proved. This assumption is, however, limited to the consideration of the legal effect of the facts pleaded in bar—*Nawab Sidhee Nazar Ally Khan* vs. *Raja Ojoodhyaram Khan*, 10 Moore, 540.

When a summons has been issued for the settlement of issues only, a Judge should not proceed and try the cause unless under the circumstances laid down in this section, for otherwise he might preclude a party from adducing evidence in support of his case—*Sheikh Jeewun* vs. *Goolab Khan*, 1 Alla., 147; but if the evidence adduced is decisive of the matter in dispute, then the Judge may dispose of the cause unless either of the parties distinctly objects and asks for time to produce evidence in support of his case—*Soorendro Pershad Dobey* vs. *Jugobundhoo Pandey*, 22 W. R., 426.

If either party fails to produce his evidence, Court may pronounce judgment, or adjourn suit.

155. If the summons has been issued for the final disposal of the suit, and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment,

or may, if it thinks fit, after framing and recording issues under section 146, adjourn the suit for the production of such evidence as may be necessary to its decision upon such issues.

This section applies to H. C., and except the second paragraph) to M. S. C. C.

Plaintiff sued on a bond to recover a sum of money. He filed no written statement, and the case was fixed for final disposal on the 23rd of April, when defendants admitted execution of the bond, but said that it had been delivered as a security to the plaintiff to borrow money and apply it to a special purpose which he had not done. On this, plaintiff's pleader stated that he was taken by surprise, that he had no instructions how to meet the defence, and asked for a postponment, which was refused. *Held*, the postponment should have been granted—*Moonshee Syud Ameer Ali* vs. *Baboo Run Bahadoor Singh*, 7 W. R., 84.

CHAPTER XIII.

OF ADJOURNMENTS.

Court may grant time, and adjourn hearing.

156. The Court may, if sufficient cause be shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Costs of adjournment.

In all such cases the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been ex-

amined, unless the Court finds the adjournment of the hearing to be necessary for reasons to be recorded by the Judge with his own hand.

This section applies to H. C. and M. S. C. C.

A Civil Court is not competent to bind witnesses by recognizances to attend on a future day. See, however, section 173, *infra*.

Under Act VIII, 1859, a verbal order of the Court to witnesses requiring them to attend on a future day would not justify the issue of a warrant for the apprehension of such witnesses, if they failed to attend in obedience to such verbal order—*S. Venkatappah* vs. *D. Papammah*, 5 Mad., 132: but as to the present law, see sections 173, 174.

Sufficient Cause.—The plaintiffs made an application in chambers for the issuing of a commission to England to take the evidence of a material witness, and in support of the application an affidavit of one of the defendants was used. The Judge referred them to the Court, and on the application being renewed in Court, he declined to take cognizance of what had passed in chambers, refused the application as the affidavit was not in Court, and dismissed the suit. *Held*, that the Judge should have allowed time to produce the affidavit, and that postponement should not have been refused on that ground—*Dadabhai Naoroji* vs. *Sorabji Cawasji*, 3 Bom., 55. So where a person sued on a money bond, and at the trial defendant, admitting the bond, pleaded that it had been given to plaintiff only as a security for borrowing money and to apply it in a certain manner, and plaintiff's pleader declared that he was taken by surprise and without instructions. It was held that he should have been allowed another day—*Moonshee Syud Ameer Ali* vs. *Baboo Run Bahadoor Singh*,, 7 W. R., 84; and so also when a petition of objection was filed on the 5th, but the case was not taken up on the day fixed for hearing, as the Judge left the station on the 8th, for an uncertain period (putting the Court in charge of the Subordinate Judge), and on his return he decided the suit on a day not fixed for its hearing, although the objector applied for time to file his documents, it was considered that the objector had shewn sufficient cause for an adjournment—*Baboo Seetaram Sahoo* vs. *Roy Baboo She Gollam Sahoo*, 18 W. R., 325.

Not Sufficient Cause.—Defendant was aware some time previous to the trial that his case was coming on. He got ill some ten or twelve days before hearing, but instead of asking for a commission, put in a medical certificate at the trial that he was confined to his bed by lumbago. It was held insufficient to support an application for an adjournment, and the suit was decreed against him—*Simon Elias* vs. *Jorawar Mull*, 24 W. R., 202.

Order.—Special notice should be given to the parties of the day fixed; an adjournment by proclamation is irregular—6 Mad R., xxix. Once an order for an adjournment has been made, it should not be rescinded on review, unless on good and sufficient cause shewn and in the presence of the other party—*Bishen Perkash Singh* vs. *Ruttun Geer Chela*, 20 W. R., 3. Orders under this section are not open to appeal (section 588); but their propriety can be questioned in an appeal from the final decree (section 594)—*Bishen Perkash Singh* vs. *Ruttun Geer Chela*, 20 W. R., 3. Judges in appeal are not inclined to interfere with the inferior Courts, in exercise of the discretion allowed them to grant or refuse an adjournment—*Simon Elias* vs. *Jorwar Mull*, 24 W. R., 202.

Procedure if parties fail to appear on day fixed

157. If, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Chapter VII, or make such other order as it thinks fit.

This section applies to H. C. and M. S. C. C.

This section does not apply unless a day has been fixed for hearing under section 156—*Baboo Seetaram* vs. *Roy Baboo She Gollam Sahoo*, 18 W. R., 325; and it is illegal to decide a case in the absence of any party without fixing a day for the hearing of the case, if the hearing has not taken place on the day originally fixed—*Meer Mukkoo* vs. *Mussamut Ameerun*, S. D. (N. W.) 1865, p. 197.

It was held that the distinction between the sections of Act VIII of 1859 corresponding to this section and section 158 was that where there was a default of appearance of the parties and their pleaders on the date fixed for the adjourned trial of a suit, a decree might be passed under the section corresponding to this section, and subsequently the case might be revived under section 19 of Act VIII; but where the order was passed under the section corresponding to section 158 the matter could not be revived, but was only subject to review of judgment or to appeal—*Ambalavana Padeiyatchi* vs. *Subramania Padeiyatchi*, 6 Mad., 262.

Court may proceed notwithstanding either party fails to produce evidence, &c.

158. If any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

This section applies to H. C. and M. S. C. C.

"It is the business of the Court, on receiving an application for a summons to a witness, or for a commission to examine a witness, to consider whether it is likely that the summons can be served or the commission executed so as to bring the witness or his examination before the Court on the day fixed for the hearing. A party has a legal right to ask the assistance of the Court in these matters, and the Court should grant it as a matter of course. It is for the party and not for the Court to consider whether he can derive any advantage from his application. If he has delayed so long that he fails to get the process executed in sufficient time, he of course must take the consequence of his delay, and the Court will not adjourn the case to remedy his neglect. Unless it appears clearly that it is not only improbable, but impossible, for the process to be effectually issued, the application should be complied with. Indeed, I have great doubts whether it should not be complied with in every instance, as it may happen that the case may not be called up for hearing on the day originally fixed, and possibly the witness or the return to the commission might be in Court on the day to which it may be adjourned. If the party to a suit thinks it worth his while to incur the expense of taking out a process on the chance of deriving benefit from it, I would not prevent his doing so. I would only take care that he did not use the late issue of the process as an excuse for delaying the final hearing of the case"—*Hurree Dass Bysack* vs. *Meer Moazzum Hossein*, 15 W. R., 447. See the note under section 159, *infra*.

This section appears to contemplate a case where the party has expressly obtained time to produce his evidence, or to procure the attendance of his witnesses, and has failed to do so. It does not refer to adjournments by the Court at its own motion—*Pearee Mohun Bera* vs. *Shama Churn Mytee*, 19 W. R., 35. But where defendant's pleader who had obtained an adjournment to obtain certain documents failed and was still in default when the case was called on, and a decree was given to plaintiff, the decision was considered to fall within this section, and not section 156—*Rangasawmy Mudelliar* vs. *Sirangan*; *Thandraya Gounden* vs. *Sithaiyan*, 4 Mad., 254; and so also where vakil of plaintiff on the second hearing of the case applied for a summons against a witness, and on the case coming on was, owing to the absence of his witness, unprepared to go on, and the case was dismissed, the case was considered to have been disposed of under this section—*Comalammal* vs. *Rungasawmy Iyengar*, 4 Mad., 56. Where the plaintiff cited one of the defendants as his witness, but his application for his examination was disallowed under Act VIII of 1859, and on the adjourned day of hearing he failed to produce any other witness, it was held that, as the plaintiff had been prevented by insufficient grounds from examining the defendant as a witness, he had not committed default within the meaning of section 148, and that therefore the suit had not been properly heard and determined. The order was set aside, and the case was remanded—*Latchmana Rau Saib* vs. *Ragunatha Rau*, 6 Mad., 299; and when in a suit the issues having been settled, the final hearing was adjourned to a fixed date for final disposal, and on that day the plaintiff not appearing the suit was dismissed under section 148, Act VIII of 1859. *Held*, that though the Court could have proceeded under section 147 of that Act (158 of this Code) to dismiss the suit, the order was bad and the plaintiff had the right to petition under section 119 of that Act (section 103 of this Code)—*Ryall* vs. *Sherman*, I. L. R., 1 Mad., 287.

This section differs from section 148, Act VIII, 1859, inasmuch as under it the Court was bound to "decide the suit on the record." The effect of these words was that, though the Appellate Court could remand a case for decision on the merits, the Lower Court could not admit any evidence after the remand, but was bound to decide it on the record as it stood when the case was remanded—*Lochun Mundul* vs. *Wuzeer Puramanik*, 13 W. R., 464; *Puddo Lochun* vs. *Sirdar Khan*, 12 W. R., 23. The Court is not so bound under the present procedure.

CHAPTER XIV.

OF THE SUMMONING AND ATTENDANCE OF WITNESSES.

Summons to attend to give evidence or produce documents.

159. The parties may, after the summons has been delivered for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit, obtain, on application to the Court or to such officer as it appoints in this behalf, before the day fixed for such settlement or disposal, as the case may be, summonses to persons whose attendance is required either to give evidence or to produce documents.

This section applies to H. C. and M. S. C. C.

Adjournment and summoning witnesses are distinct matters. Application may be made at any stage of the case before hearnig—*Anurup Chundra Mukhopadhya* vs. *Hiramani Dasi*, 3 B. L. R., App., 38. The Court is bound to issue summonses when asked for, as a matter of course—*Brojo Nath Mookhopadhya* vs. *Protap Chunder Thakoor*, 22 W. R., 296; *Gora Chand Ghose* vs. *Rajcoomar Doss*, 5 W. R., 111; unless they are summoned in such numbers or in such a manner as indicates a vexatious desire of obstructing the course of justice—*Ram Phul Pandey* vs. *Wahed Ali Khan*, 14 W. R., 66; or the application has been made at a time when it is *absolutely impossible* that the witness can be brought in in time to be examined before the party calling them closes his case—*Rajendro Narain Neogi* vs. *Raja Kumud Narain Bhup*, 3 C. L. R., 569; *Brojo Lall Mookerjee* vs. *Aughore Lall Ghosal*, 25 W R., 71; *Indro Chunder Baboo* vs. *Dunlop*, 9 W. R., 530; *Syud Abdool Ali* vs. *Mullick Sudderooddeen Ahmed*, 14 W. R., 493; see however *Krishna Churn Baisack* vs. *Protab Chunder Surma*, I. L. R., 7 Cal., 560, but though summonses have been granted, if the witnesses do not appear at the trial, the Court will proceed unless an application is made to adjourn—*Nundo Kishun Chowdhry* vs. *Goluck Nath Neogee*, 11 W. R., 99; and even then the Court is not bound to grant an adjournment unless on good cause shewn—*Abdool Kadir* vs. *Shaikh Abin Mordha*, 24 W. R., 290. See note under section 158, *supra*.

Practice.—Parties who have the benefit of legal advice ought to be left to manage their own cases without interference from the Court. Where the evidence of a witness or the production of a document is material to plaintiff's case, it is his business to move the Court to take the necessary steps in the matter—*Nobin Chunder Roy Chowdhry* vs. *Anungo Munjuree Debia*, 23 W. R., 83, and though in cases where the process of the Court is abused any person affected can bring the matter before the Court, a mere witness summoned to give evidence has no right to apply to the Court to discharge the order—In re *Gold Company*, 12 Ch. Div., 82.

Expenses of witnesses to be paid into Court on applying for summons.

160. The party applying for a summons shall, before the summons is granted and within a period to be fixed by the Court, pay into court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned, in passing to and from

the Court in which he is required to attend, and for one day's attendance.

Scale of expenses.

If the Court be subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to the rules (if any) laid down by competent authority.

This section applies to M. S. C. C.

Tender of expenses to witness.

161. The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

This section applies to H. C. and M. S. C. C.

Procedure where insufficient sum paid in.

162. If it appear to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account; and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Expenses if witness detained more than one day.

If it be necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of the party at whose instance he was summoned; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

This section applies to H. C. and M. S. C. C.

A party need not pay any sum into Court until the Court has fixed what is reasonable—*Mohun Mundur* vs. *Brij Bhookun Singh*, 9 W. R., 128; and the sum fixed must have reference to the travelling expenses or other charges of a similar nature, and where a witness who had incurred no expenses in travelling asked for compensation for loss of time, the application was refused—*Nawab Nazim of Bengal* vs. *Rajah Prosononarain Deb*, 2 Hyde, 236. It should be sufficient to cover the witnesses' expenses to and from the Court and for one day's attendance—*Edward Dubois de Sarun* vs. *Hurish Chunder Biswas*, 5 W. R., Ref., 6. No separate action will lie for such expenses—(*Id.*)

After the list of witnesses has been filed and the cost of service, &c., deposited, the Court's officers, and not the party, are responsible for the service and return of

process—*Mussamut Mussites Khanum* vs. *Mussamut Hookoom Bibee*, 15 W. R., 88; but if it does not appear from the record that expenses have been deposited, and a witness does not attend because his travelling charges had not been tendered to him, the party to blame will suffer—*Ishan Chunder Sen* vs. *Onath Nath Deb*, 18 W. R., 16.

A witness is entitled to be paid his expenses by the party at whose instance he has been called, although he has not applied for them before giving his evidence—*London, Bombay, and Mediterranean Bank* vs. *Mahomed Ibrahim Parker*, I. L. R., 4 Bom., 619.

There is no appeal from an order under this section (section 588). See as to the old Law—*Bijoy Kishen Mookerjee* vs. *Joy Kishen Mookerjee*, 12 W. R., 430.

Time, place, and purpose of attendance to be specified in summons.

163. Every summons for the attendance of a person to give evidence or produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document which the person summoned is called on to produce shall be described in the summons with reasonable accuracy.

This section applies to H. C. and M. S. C. C.

A written summons distinctly describing the nature of the document required must be issued on a party required to produce it; a verbal order to his pleader is not such a summons as is contemplated by law, and is not sufficient—*Doorgamonee Dossee* vs. *Benodemonee Dossee*, W. R., 1864, p. 164.

Summons to produce document.

164. Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons, if he cause such document to be produced instead of attending personally to produce the same.

This section applies to H. C. and M. S. C. C.

Power to require persons present in Court to give evidence.

165. An yperson present in court may be required by the Court to give evidence or to produce any document then and there in his actual possession or power.

This section applies to H. C. and M. S. C, C.

Summons how served.

166. Every summons to a person to give evidence or produce a document shall be served as nearly as may be in manner hereinbefore prescribed for the service of summons on the defendant; and the rules contained in Chapter VI as to proof of service shall apply in the case of all summonses served under this section.

This section applies to H. C. and M. S. C. C.

See *Prem Chand Roy* vs. *Bacharam Mookerjee*, 6 W. R., 126.

Time for serving summons.

167. The service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

This section applies to H. C. and M. S. C. C.

Attachment of property of absconding witness.

168. If the serving-officer certify to the Court that the summons for the attendance of a person, either to give evidence or to produce a document, cannot be served, the Court shall examine the serving-officer on oath touching the non-service:

and upon being satisfied that such evidence or production is material, and that the person for whose attendance the summons has been issued is absconding or keeping out of the way for the purpose of avoiding the service of the summons, may issue a proclamation requiring him to attend to give evidence, or produce the document, at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door of the house in which he ordinarily resides.

If he does not attend at the time and place named in such proclamation, the Court may, in its discretion, at the instance of the party on whose application the summons was issued, make an order for the attachment of the property of the person whose attendance is required, to such amount as the Court thinks fit, not exceeding the amount of the costs of attachment and of the fine which may be imposed under section 170:

Provided that no Court of Small Causes small make an order for the attachment of immoveable property.

This section applies to H. C. and M. S. C. C.

If the serving-officer returns that the summons cannot be served, the Court is bound to examine him on oath, touching the non-service in every case. This will absorb a great deal of the Judge's time.

It is the duty of the party requiring a proclamation to move the Court—*Nund Mohun Chowdry* vs. *Golucknath Neogee*, 11 W. R., 99. Before it can issue the Judge must be satisfied, and the grounds of his satisfaction should be recorded—*Ozeer Mahomed* vs. *Bydnath Doss Chowdry*, 5 W. R., Act X, 6 (although that is not absolutely necessary—*Siddhessuree Debia* vs. *Denobundhoo Kundoo*, 6 W. R., 65), that the evidence of the witness is material, and that he is keeping out of the way of the summons—*Kalee Dass Chuckerbutty* vs. *Eshan Chunder Chatterjee*, 13 W. R., 416; or absconding—*Ajoodhya Doss* vs. *Bibee Misrun*, 15 W. R., 176. Both these conditions must be fulfilled—*Bhoobun Moyee Dossee* vs. *Kishoree Dossee*, 6 W. R., 235; and where they exist, the Judge should not refuse an application, unless it appears that the applicant has disentitled himself to the assistance of the Court either by reason of having aided in or connived at the absconding of the witness, or of having otherwise placed himself in such a position that it would be inequitable to grant it—*Rajoo*

Singh vs. *Lalla Balgobind Lal*, 1 W. R., 26. When the return was made on the day of trial, the party was considered entitled to some time to prove that the witness's evidence was material—*Premchand Roy* vs. *Becharam Mookerjee*, 6 W. R., 126.

On the expiry of the proclamation, it is the duty of the party to make an application for attachment if he wishes to exhaust all the means granted to enforce attendance—*Luchmun Singh* vs. *Chokowree Singh*, 25 W. R., 154. The Judge is not bound to act on the application; he has a discretion, but the discretion must be exercised in a reasonable manner—*Poran Chunder Ghose* vs. *Gopenath Singh*, 8 W. R., 505; and if he refuses to issue a process of attachment he should record his reasons for refusing—*Oseer Mahomed* vs. *Bydnath Doss Chowdry*, 5 W. R., Act X, 6; though apparently he is not bound to do so—*Siddhessuree Debia* vs. *Denobundoo Kundoo*, 6 W. R., 65.

A Judge has no power to order the attachment of any property unless it belongs to the persons whose attendance is necessary, and he should be most careful not to disturb the possession of a third party. At the same time the law does not make any provision for any investigation by a Judge into the claims of a third party to property which has been attached, and he commits no error in refusing to do so. The claimant is not barred by the sale, and may bring an action in the Civil Court—*Queen* vs. *Chumroo Roy*, 7 W. R., Cr., 35.

If witness appears, attachment may be withdrawn.

169. If, on the attachment of his property, such person appears and satisfies the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

This section applies to H. C. and M. S. C. C.

If such person appears.—This means that he has given himself up voluntarily. This section seems to contemplate that there will be a trial by the Court, and implies that evidence to prove the person was absconding as well as evidence in exculpation should be heard in his presence, and a determination come to on the point whether he had absconded or striven to evade service—*Bishonath Sircar*, Petitioner, 3 W. R., Cr., 63. Where a Magistrate under a very similar section refused to release property and dispose of a case without allowing the party to shew cause, his decision was set aside—*Jhundoo Sing and others*, Petitioners, 5 W. R., Cr., 8; see also *Mudhusudun Sing*, Petitioner, 1 W. R., Cr., 27.

Procedure if witness fails to appear.

170. If such person does not appear, or, appearing, fails to satisfy the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court may impose upon him such fine not exceeding five hundred rupees as the Court thinks fit, having regard to his condition in life and all the circumstances of the case, and may order the property attached, or any part thereof, to be sold for the purpose of satisfying all costs incurred in consequence of such attachment, together with the amount of the said fine, if any:

Provided that, if the person whose attendance is required pays into Court the costs and fine as aforesaid, the Court shall order the property to be released from attachment.

This section applies to H. C. and M. S. C. C.

Before a Judge should proceed to fine a person under this section and order the sale of his property, he should be careful to see that all the formalities required by law, when issuing processes of proclamation and attachment, have been complied with, as any serious error of law in so doing might be sufficient to vitiate the order of sale. Looking at the decisions on the Criminal Procedure Code it seems probable that an order of fine and sale would be set aside if the Judge issued processes of proclamation and attachment without recording on what grounds he was satisfied that the evidence was material, and that the party had absconded or concealed himself in order to evade service—*Bishonath Sircar*, Petitioner, 3 W. R., Cr., 63; or if there was any doubt whether the proclamation was properly issued, and there was no evidence to shew that the party did not appear within the time fixed by the proclamation—*Shewdyal Sing* vs. *Griban Sing*, 6 W. R., Cr., 73. A nazir's report is not legal evidence on which to base a conviction—*Nilcant Bhuttacharjee*, Petitioner, W. R., Mis., 1864.

A witness is not bound to attend if the trial is fixed for a Sunday—*Queen* vs. *Hargobind Dutta Sirkar*, 8 B. L. R., App., 12.

A suit will not lie to set aside a sale under this section—*Bukhoree Sing* vs. *Government and others*, 8 W. R., Cr., 207; but the claimant is not barred by the sale, and may bring an action against the purchaser to establish his right to the property—*Queen* vs. *Chumroo Roy*, 7 W. R., Cr., 35.

Court may of its own accord summon as witnesses strangers to suit.

171. Subject to the rules of this Code as to attendance and appearance and to the provisions of the Indian Evidence Act, 1872, if the Court at any time thinks it necessary to examine any person other than a party to the suit and not named as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

This section applies to H. C. and M. S. C. C.

Duty of persons summoned to give evidence or produce document.

172. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit must attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document must either attend to produce it, or cause it to be produced, at such time and place.

This section applies to H. C. and M. S. C. C.

When they may depart.

173. No person so summoned and attending shall depart unless and until (*a*) he has been examined or has produced the document and the Court has risen, or (*b*) he has obtained the Court's leave to depart.

This section applies to H. C. and M. S. C. C.

This section gets rid of a difficulty felt in the case of *S. Venkatappah* vs. *Papammah*, 5 Mad., 132, in which it was held that when a case was adjourned for further hearing, before the witnesses had been examined, the Court could not bind them down to attend again.

Consequences of failure to comply with summons.

174. If any person on whom a summons to give evidence or produce a document has been served fails to comply with the summons, or if any person so summoned and attending departs in contravention of section 175, the Court may order him to be arrested and brought before the Court:

Provided that no such order shall be made when the Court has reason to believe that the person so failing had a lawful excuse for such failure.

When any person so brought before the Court fails to satisfy it that he had a lawful excuse for not complying with the summons, the Court may sentence him to fine not exceeding five hundred rupees.

Explanation.—Non-payment or non-tender of a sum sufficient to defray the expenses mentioned in section 160 shall be deemed a lawful excuse within the meaning of this section.

Procedure when witness apprehended cannot give evidence or produce documents.

If any person so apprehended and brought before the Court cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and on such bail or security being given, may release him.

This section applies to H. C. and M. S. C. C

This section contemplates the case of a person who has been served and fails to attend: not to the case of a person who has not been served. It is the duty of the parties to move the Court when witnesses do not appear—*Buchman* vs. *Lall Beharee Pandey*, 13 W. R., 324; and though the Court has a discretion, it should not allow witnesses to evade attendance —*Sreemutty Saroda Dossee* vs. *Rajah Burda Kant Roy*, 5 W. R., Act X, 49; *Ozeer Mahomed* vs. *Rydnath Doss Chowdhry*, 5 W. R., Act X, 6; and if they are material and there is no reason to believe that the applicant has aided in or connived at their absconding, or has otherwise placed himself in a position that it would be inequitable to grant his application, the application should be granted—*Rajoo Singh* vs *Lalla Balgobind Lal*, 1 W. R., 26; and so if they have been summoned and there is no person in attendance to account for their absence, the Court should not refuse to take action under this section—*Sheikh Jafur* vs. *Gooroo Pershad Doss Potedar*, 3 W. R., 97; *Periyanna Chetty* vs. *Gobinda Goundun*, 5 Mad., 104. The opinion of the Judge, that the witnesses are not likely to benefit a party's case—*Ozeer Mahomed* vs. *Rydnath Doss Chowdhry*, 5 W. R., Act X. 6, or his dislike to punish witnesses for non-attendance afford no valid reason for refusal—*Nilmones Banerjee* vs. *Shurbo Mungola Debee*, 6 W. R., 14. For the same reason, if the case falls clearly within the section, summonses should not be re-issued—*Bissumbhur Sircar* vs. *Soorodhuny Dossee*, 3 W. R., 21.

The Court is bound to pass some order on an application under this section—*Nilmoney Chowdhry* vs. *Hossein Ally*, 5 W. R., 232.

Lawful excuse.—That is, such an excuse as would justify a witness refusing to give evidence or produce a document—*Lekh Raj* vs. *Palee Ram*, 1 Alla., 241.

Procedure when witness absconds.

175. If any person so failing to comply with a summons absconds or keeps out of the way, so that he cannot be apprehended and brought before the Court, the provisions of sections 168, 169 and 170 shall, *mutatis mutandis*, apply.

This section applies to H. C. and M. S. C. C.

Persons bound to attend in person.

176. No one shall be bound to attend in person to give evidence or to be examined in Court unless he resides—

(*a*) within the local limits of its ordinary original jurisdiction, or

(*b*) without such limits and at a place less than fifty, or (where there is railway communication for five-sixths of the distance between the place where he resides and the place where the Court is situate) two hundred miles distant from the Court-house.

This section applies to H. C. and M. S. C. C.

Consequence of refusal of party to give evidence when called on by Court.

177. If any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his actual possession or power, the Court may in its discretion either pass a decree against him, or make such order in relation to the suit as the Court thinks fit.

This section applies to H. C and M. S. C. C.

The party must be present in Court; he must refuse without lawful excuse; and the document must then and there be in his actual possession or power. Even then the Court may exercise its discretion, and is not bound to give a decree against him; but a party who *bonâ fide*, and for a substantial reason, requires the evidence of another to be taken, ought not, under ordinary circumstances, have a decree given against him until that evidence has been given—*Roy Dhunput Sing* vs. *Prem Bibee*, 24 W. R., 72. If a party when summoned as a witness refuses to produce accounts relevant and material—(partnership account)—*Kalakam Venkaiya* vs. *Bhupalram Pedda Mullasappah*, 4 Mad., 142; or to answer a material question and does not endeavour to purge his contempt—*Jeshla Ramje Shett* vs. *Awaker Mullandeagata Kanti*, 3 Mad., 299, the suit may be dismissed.

Lawful excuse.—Lawful excuse will more or less depend on the circumstances of each case. Where a defendant, though saying that he was willing to attend, did not, and shewed no good reason for his non-attendance, it was held that he was within the section—*Baboo Doorga Dutt Sing* vs. *Jheengoor Jha*, 18 W. R., 63; in this section it generally means such an excuse as, under the Evidence Act, would justify a refusal to give evidence or produce the document required. See note under section 120, *supra*.

Rules as to witnesses to apply to parties summoned.

178. Whenever any party to a suit is required to give evidence or to produce a document, the rules as to witnesses contained in this Code shall apply to him so far as they are applicable.

This section applies to H. C. and M. S. C. C.

Section 170 of Act VIII, 1859, has not been re-enacted; and save in the cases referred to in sections 177 and 120, a case cannot be decided against a party for merely disobeying an order to attend.

CHAPTER XV.

OF THE HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

Statement and production of evidence by party having right to begin.

179. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he his bound to prove.

Rules as to right to begin.

Explanation.—The plaintiff has the right to begin unless where the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Taylor on Evidence, sections 350, 353, 356. This section applies to H. C. and M. S. C. C.

There is no invariable rule that in a suit for mesne profits the *onus* is on the defendants —*Krishna Mohun Basak* vs. *Kunjo Behari Basak*, 9 C. L. R., 1.

In a suit for partition of certain property and money-lending businesses, the defendant admitted a nucleus of joint property and claimed the rights to begin. *Held*, that unless the defendant admitted all the material allegation in the plaint the plaintiffs were entitled to begin—*Agore Nath Neogi* vs. *Prem Chand Neogi*, 7 C. L. R., 274.

Plaintiffs must be represented by one pleader or set of pleaders and cannot be represented severally by different pleaders—*Jankibai* vs. *Atmaram Baburam*, 8 Bom., 241.

It is not the practice to hear more than one counsel or vakil in support of original motions or applications, against which no cause has been shewn in the first instance.—The petition of *Baroda Soondree Dossee*, B. L. R., Sup., Vol., 609.

Statement and production of evidence by other party.

180. The other party shall then state his case and produce his evidence (if any).

Reply by party beginning.

The party beginning is then entitled to reply.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. In the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

This section applies to H. C. and M. S. C. C.

The common law practice in respect of the right to begin has always been followed by the High Court—*Sreemutty Rungamony Dossee* vs. *Brojo Lall Dey*, Cory., 25 : and where a party did not go into evidence, but had not intimated his intention not to do so, the other side was entitled to reply—*Virasvami Chetti* vs. *Appasvami Chetti*, 1 Mad., 377.

Where a claim was made under section 246, Act VIII, 1859, by a third party to some timber which had been attached by a prohibitory order under section 234, the claimant was compelled to begin—*Nga Tha. Yah* vs. *Burn*, 2 B. L. R. (F. B.), 91.

It is not the business of the Court to determine what witnesses shall be examined ; the parties must select them, summon them, and, if they do not attend, move the Court to secure their attendance—*Nund Mohun Chowdhry* vs. *Goluck Nath Neogee*, 11 W. R., 99 ; and when they are present, call upon the Court to examine such of them as they may offer for examination—*Morno Moyee Bebee* vs. *Bheem Coomar Chowdhry*, 6 W. R., 231; *Soonder Narain Pandah* vs. *Shaikh Nundar*, 21 W. R., 407, even though the nazir may have reported that they are in attendance—*Deen Dyal Singh* vs. *Danee Roy*, 13 W. R., 185. On the other hand, it is the duty of the Judge to examine every witness tendered, though he has not been summoned or his name has not been entered in his list—*Rakhal Doss Mundul* vs. *Protap Chunder Hazrah*, 12 W. R., 455 ; unless it is clear that the intention of the person producing the witness is to delay or obstruct justice—*Chowdhry Khoorgo Roy* vs. *Shib Tohul Roy*, 17 W. R., 172. He should not select a certain number for examination—*Ramdhan Mandal* vs. *Raj Ballab Paramnik*, 6 B. L. R., App., 10; nor send some away because he had examined as many on one side as on the other—*Gopee Ojha* vs. *Hur Gobind Singh*, 12 W. R. 229, or thinks

their evidence will probably not be of much value—*Loolo Singh* vs. *Rajendur Laha*, 8 W. R., 364; nor because he is satisfied on the evidence already recorded—*Brij Soondur Roy* vs. *Bibi Khairunnissa*, 23 W. R., 63, but if he refuses to examine them as unnecessary, or tells the party so, and the party does not tender them, the Appellate Judge should not, if the matter is brought to his notice, decide the case without hearing the witnesses—*Ram Jewun Singh* vs. *Radha Pershad Singh*, 16 W. R., 109; *Hurrish Chunder Ghose* vs. *Gopal Chunder Ghose*, 20 W. R., 203; *Mokeem Tandal* vs. *Nawab Syed Ali Ahmud*, 3 W. R., Act X, 133; *Watson & Co.* vs. *Nukee Mundul*, 6 W. R., Act X, 83, provided he is satisfied that the witnesses were present, and a *bonâ fide* application for their examination was made—*Keenoo Singh Roy* vs. *Eshan Chunder Roy*, 6 W. R., 213; *Surm Rae* vs. *Ubhman Rae*, 2 Alla., 209; and this, looking at the general practice, should be proved by a copy of the petition and refusal to examine and not by affidavit —*Ramessur Bhuttacherjee* vs. *Shib Narain Chuckerbutty*, 14 W. R., 419; *Gooroo Doss Akhoolee* vs. *Puran Mundal*, 12 W. R., 363, but see *Parmeshari Proshad Narain Singh* vs. *Mahomed Syad*, I. L. R., 6 Cal., at p. 611. But if no such objection is raised before the first Appellate Judge, then, to succeed in special appeal, it must be shewn that they would have been material to the case—*Nilkaunth Surma* vs. *Soosela Debia*, 6 W. R., 324; *Osman Singh* vs. *Chummun Maktoon*, 15 W. R., 87.

It is in the discretion of the Court of first instance to allow a party to call further evidence after he has closed his case—*Rakhal Doss Mundul* vs. *Protap Chunder Hazrah*, 12 W. R., 455; but it should not be allowed without some good reason—*Hurro Monee Dassea* vs. *Onookool Chunder Mookerjee*, 8 W. R., 461.

A plaintiff has no right to complain that he had no opportunity of producing rebutting evidence, when he was summoned on behalf of defendant, and did not attend—*Radha Jeebun Moostofee* vs *Grees Chunder Roy*, 8 W. R., 461; and where such evidence is allowed it should be confined to matters which the party proposing to contradict would have been allowed himself to prove in evidence—*Kazi Gulam Alli* vs. *Aga Khan*, 6 Bom., 93.

When a witness has been examined on behalf of the plaintiff, he cannot be re-called as a witness for the defendant without leave obtained at the end of the first examination—*Mackintosh* vs. *Nobin Money Dassee*, 2 Ind. Jur., N. S., 160.

There should be cogent reasons to necessitate the Court to order principals to leave the Court while the evidence of witnesses is being recorded. The other witnesses should leave the Court—*Buddrenath* vs. *Issorepershad*, 2 Hyde, 249.

Account Books.—Under the Rules of the High Court, account books not translated cannot be referred to in an appeal without the special leave of the Court—*Madhub Pershad* vs. *Fool Coomaree Bibee*, 19 W. R., 121.

Witnesses to be examined in open Court.

181. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence, and under the personal direction and superintendence, of the Judge.

This section applies to H. C. and M. S. C. C.

Purda ladies, not claiming exemption under section 640, should be allowed to remain in their palanquins in Court while giving their evidence—1 B. L. R., App., 1; and the same privilege should be extended to women who, though not purda ladies, are not accustomed generally to appear before the public—*Kistomohun Mookerjee* vs. *S. M. Adarmoney Dabee*, 2 Hyde, 88.

In regard to cases of contempt, see *ex-parte Padavay Chetti*, 2 Mad., 319; *Lekh Raj* vs. *Palee Ram*, 1 Alla., 241.

How evidence shall be taken in appealable cases.

182. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties or their pleaders, and the Judge shall, if necessary, correct the same and shall sign it.

This section applies to cases under Act X, 1870—*Heysham* vs. *Bhola Nath Mullick*, 17 W. R., 221.

The direction to take down evidence is imperative; and where the provisions of this section have not been followed, as if the evidence has not been read over and signed, the whole proceeding is irregular, and the evidence cannot be read in appeal—In the matter of *Ajudhia Prasad*, 7 B. L. R., 75; *in re Lakhmidas Hanzraj*, 5 Bom., 63; or admitted in a trial for perjury based on it—*The Empress* vs. *Mahadeb Gossami*, I. L. R., 6 Cal., 762; 8 Cal., 292; so where evidence has been recorded in the absence of the opposite party, it will be rejected if objected to—*Rajah Bommaransi Bahadoor* vs. *Rangasamy Mudaly*, 6 Moore, 232; see also *Queen* vs. *Issur Raout*, 8 W. R., Cr., 63: and in special appeal the case will be remanded to have the evidence properly recorded; provided the objection has been taken in regular appeal—*Shaikh Lall Mahomed* vs. *Shaikh Peer Nuzur*, 18 W. R., 112.

Corrections in depositions should be attested by the initials of the officer making them—1 C. O., N. W., 1873.

When deposition to be interpreted.

183 If the evidence is taken down under section 182 in a language different from that in which it was given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it was given.

Memorandum when evidence not taken down by Judge.

184. In cases in which the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record.

A separate memorandum on each witness should be recorded at the time of the examination, in the vernacular of the Judge, or in English if he knows that language sufficiently, and it should contain every material answer made by the witness in the examination-in-chief, the cross-examination and in reply to questions put by the Court in the form of a narrative—*Shaik Suheeoodeen* vs. *Luchmeeput Doogur*, 6 W. R., 112; 4 Civ. O., N. W., 1866.

The vernacular record and not the memorandum is looked upon as the deposition of the witness, and where there is any discrepancy the vernacular record must be followed—*Maharanee Heeranath Kooeree* vs. *Baboo Burm Narain Singh*, 15 W. R., 375. In a case of perjury, on a statement made before a Civil Court, the Court of Session, finding that the Judge had not made any memorandum, considered that the case could not proceed; but the High Court directed him to try the prisoner on the vernacular record—*Reg.* vs. *Beharee Lall Bose*, 9 W. R., Cr., 69.

When evidence may be taken in English.

185. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down with his own hand.

Any particular question and answer may be taken down.

186. The Court may of its own motion, or on the application of any party or his pleader take down, or cause to be taken down, any particular question and answer, or any objection to any question, if there appear any special reason for so doing.

This section applies to H. C.

187. If any question put to a witness be objected to by a party or his pleader and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Questions objected to and allowed by Court

Objections to evidence should be made in the first Court in which it is possible to object, or they will not be listened to in the Court of appeal—*Kissen Kaminee Dassee* vs. *Ram Chunder Mitter*, 12 W. R., 13; *Rajah Rommarauze Bahadur* vs. *Rangasamy Mudaly*, 6 Moore, 232; and if the evidence has been admitted without objection, in the Lower Court, it must be weighed and not rejected by the Appellate Court—*Baboo Bodhnarain Singh* vs. *Baboo Omrao Singh*, 13 Moore, 529; *Unde Rajaha Raje Bommarauze* vs. *Pemmasamy Venktadry Naidoo*, 7 Moore, 137; *Ranee Pudmavati* vs. *Doolar Singh*, 4 Moore, 285.

In a suit for wrongful dismissal defendant is not allowed to give evidence of a transaction involving instances of misconduct not set forth in defendant's written statement. He should file a supplemental written statement and this must be done before the first hearing—*Munchershaw Bezonji* vs. *The New Dhurumsey Spinning and Weaving Co.*, I. L. R., 4 Bom., 576.

188. The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Remarks on demeanour of witnesses.

This section applies to H. C.

189. In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record.

Memorandum of evidence in unappealable cases.

This section applies to M. S. C. C.

The memorandum should be written legibly in the vernacular of the Judge, or in English, if he is sufficiently acquainted with that language, and shall be signed by the Judge and dated.

190. If the Judge be rendered unable to make a memorandum as above required by this chapter, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

Judge unable to make such memorandum to record reason of his inability.

Every memorandum so made shall form part of the record.

This section applies to M. S. C. C.

This section seems to contemplate some personal inability. Press of business should not, nless under most exceptional circumstances, be accepted as a reason for the inability of ny officer to record his memorandum.

Power to deal with evidence taken down by Judge removed before conclusion of suit.

191. Where the Judge taking down any evidence, or causing any memorandum to be made under this chapter, dies or is removed from the Court before the conclusion of the suit, his successor may, if he thinks fit, deal with such evidence or memorandum as if he himself had taken it down or caused it to be made.

This section applies to M. S. C. C. See *Gour Chunder Sein* vs. *Manick Ram*, 13 W. R., 76.

The general rule is that a Judge cannot rely on evidence taken in another Court, but is bound to record his own evidence, and decide upon it—*Ali Buksh* vs. *Shaikh Sumeeroodeen*, 12 W. R., 477; reading over their previous depositions, to the witnesses, and asking them if they are true, is illegal.—*Queen* vs. *Kalundar Doos*, 2 Alla., 100; but in civil suits the necessity to examine persons who have already given evidence in a previous case may be waived by the parties assenting—*Syud Mahomed* vs. *Oomdah Khanum* 13 W. R., 184; and so the irregularity is waived if the parties agree to treat the former record as incorporated in the latter—*Maharajah Jugutendur Bunwaree* vs. *Din Dyal Chatterjee*, 1 W. R., 310; and where such an agreement has been entered into, the witnesses should not be re-examined without some good reason being adduced—*Sreenath Roy* vs. *Goluck Chunder Sein*, 15 W. R., 348.

Where the Judge died before writing his judgment, but signed an entry in a book decreeing the suit, it was held that his successor had not acted without jurisdiction in re-opening the case—*Sukhram* vs *Kala Kahar*, 3 B. L. R., 105.

The present section relaxes the general rule in cases—(1) where the Judge has died, or (2) has been removed; but not where the case has been transferred—*Naranbhai Vrijbhukandas* vs. *Naroshankar Chandroshankar*, 4 Bom., 98.

Power to examine witness immediately.

192. If a witness be about to leave the jurisdiction of the Court, or if other sufficient cause be shewn to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of either party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and may then be read at any hearing of the suit.

This section applies to M. S. C. C., and, except last para., to P. S. C. C.

An examination under this section being on the same footing as the examination of a witness in a cause must be conducted by counsel—*Hoffman* vs. *Framjee*, Coryton, 7; and before the Court: not before a Commissioner—*Edwards* vs. *Muller*, 5 B. L. R., 252.

Court may recall and examine witness.

193. The Court may at any stage of the suit recall any witness who has been examined and who has not departed in accordance with section 173, and may (subject to the provisions of the Indian Evidence Act, 1872) put such questions to him as the Court thinks fit.

This section applies to H. C. and M. S. C. C.

CHAPTER XVI.

OF AFFIDAVITS.

Power to order any point to be proved by affidavit.

194. Any Court of first instance and any Appellate Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party *boná fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

Judicature Acts, Order 37, Rule 1. This section applies to H. C.

Affidavits cannot be used without an order of Court, nor at all if the opposite party desires the production of the witness for cross-examination—*Blackburn Union* vs. *Brooks*, 7 Ch. Div., 68. Each consists of three formal parts; (1) the title; (2) the name and place of abode of the deponent; (3) the jurat. The title should give the style of the Court and the names of the parties to the action as given in the proceedings and describe the affidavit as entitled the cause in which it is filed. The jurat generally written on the left corner of the affidavit must state that the deponent was sworn (if there are more deponents than one the several names must be given), and the day of the month on which it was made, and should shew that the person before whom it was sworn had jurisdicton.

The Supreme Court would not admit an affidavit to correct the certificate of an officer of Court or shew it was wrong —*Doss* vs. *Denee*, Fulton, 165.

See note under section 180, *ante*.

Power to order attendance of declarant for cross-examination.

195. Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the declarant.

Such attendance shall be in court unless the declarant is exempted under this Code from personal appearance in court, or the Court otherwise directs.

Judicature Acts, Order 37, Rule 2. This section applies to H. C.

In interlocutory proceedings no cross-examination will be allowed on affidavit, because it would defeat the object of the whole proceedings, which is despatch. In final proceedings, cross-examination will be allowed. Instead of a cross-examination plaintiff will be allowed to file an affidavit meeting matter which has been first raised in defendants' affidavit. A party will be allowed to bring new matter before the Court by a replying affidavit—*Peacock* vs. *Harper*, 7 Ch. Div., 648. Act VI of 1855 is the foundation of the practice on the Original Side of the High Court, in the matter of affidavit—*Robarts* vs. *Steele*, 20th December 1877.

Matters to which affidavits shall be confined.

196. Affidavits shall be confined to such facts as the declarant is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that reasonable grounds thereof be set forth.

The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies

of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party producing the same.

Judicature Acts, Order 37, Rule 3. This section applies to H. C.

Leave to file informal affidavits cannot be obtained from a Court of Appeal—Weekly Notes, 1876, p. 157; and an affidavit couched in the form "I, A B, of &c., say" instead of in the usual form "I, A B, *make oath and say*" is inadmissible—*Allen* vs. *Taylor*, L. R., 10 Eq., 52. It would appear that objections to irregular affidavits should be taken when the affidavits are put in, as objections to a deposition taken by commission for irregularity, should be made when the deposition is tendered in evidence and not by an interlocutory motion to take it off the record—*De Britto* vs. *Hillel*, L. R., 15 Eq., 213. An objection for length and irrelevancy should be made at the time of hearing—*Owens* vs. *Emmens*, Weekly Notes, 1875, pp. 210, 234. Affidavits of persons having no personal knowledge of the facts should not be filed—Weekly Notes, 1876, p. 59.

Oath of declarant by whom to be administered.

197. In the case of any affidavit under this Code—

(*a*) any Court or Magistrate, or

(*b*) any officer whom a High Court may appoint in this behalf, or

(*c*) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath of the declarant.

This section applies to H. C.

The jurat should describe the person before whom the affidavit has been sworn, so that it may appear to have been taken by a competent authority.

CHAPTER XVII.

OF JUDGMENT AND DECREE.

Judgment when pronounced.

198. The Court, after the evidence has been duly taken and the parties have been heard either in person or by their respective pleaders or recognized agents, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

This section applies to M. S. C. C.

A judgment does not create a right or title, it only asserts an antecedent one—*Doss* vs. *Bannerjee*, 1 Boulnois, 80.

The meaning of this section is that judgment must be given upon evidence duly recorded before the Judge himself, and not on evidence taken before another person, unless where such evidence is as it is under sections 382, 391, and 191, admissible at the hearing—*Naranbhai Vrijbhee Kandas* vs. *Naroshankar Chandroshankar*, 4 Bom., 102, but the irregularity may be waived by consent of parties, and would not be a good ground for reversing a case in special appeal, unless it appeared that the appellant had been prejudiced by it, *id. Radhanath Banerjee* vs *Judoonath Sing*, 7 W. R., 441; *Gour Chunder Sein* vs. *Maniek Ram*, 13 W. R., 76. Judgment should be pronounced in open Court; but where a Judge made a local enquiry, and taking evidence on the spot gave judgment there instead of returning to Court, the irregularity was not considered a good ground of appeal—*Nilmoney Singh Deo* vs. *Bhobany Churn Panda*, Marsh., 327.

There is no objection to a Judge at the close of the hearing of a suit stating at once, orally, the judgment which he intends to record and deliver; but it would not be a judgment; he must afterwards pronounce his written judgment in open Court—5 Mad., VIII; and it has been held that even the written opinions of the Judges of the High Court who heard the case, but ceased to be Judges before judgment was pronounced, could only be regarded as mere minutes and not as judgments—*Mutty Lall Sen Gywal* vs. *Deshkavi Roy*, 9 W. R., 1.

Power to pronounce judgment written by Judges' predecessor.

199. A Judge may pronounce a judgment written by his predecessor, but not pronounced.

This section follows the decision in the case of *Mussamut Parbutty* vs. *Mussamut Higgin*, 17 W. R., 475. It applies to M. S. C. C.

Language of judgment.

200. The judgment shall be written in the language of the Court, or in English, or in the Judge's mother-tongue.

This section applies to M. S. C. C.

Under Act VIII of 1859, the judgment must have been written either in the vernacular language of the Judge, or in English ; under the present law another alternative, the "language of the Court," has been added. See on this point section 645, *infra*. The irregularity of recording a judgment in the wrong language does not affect the validity of the decision—*Huro Soonduree Debee* vs. *Sreedhur Bhuttacharjee*, 17 W. R., 352.

Translation of judgment.

201. Whenever the judgment is written in any language other than that of the Court, the judgment shall, if any of the parties so require, be translated into the language of the Court, and the translation shall also be signed by the Judge or such officer as he appoints in this behalf.

This section applies to M. S. C. C.

Judgment to be dated and signed.

202. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and shall not be altered or added to, save to correct verbal errors or to supply some accidental defect not affecting a material part of the case, or on review.

This section applies to M. S. C. C.

This section prohibits the Judge from adding to his judgment. Under Act VIII the High Court at Calcutta decided that, though the Code did not authorize the recording of any further grounds for a decision or of any addition to a judgment once delivered, such a course was not expressly forbidden, and a Judge might lawfully append to his judgment such additional reasons as might tend more fully to shew the correctness of the decision at which he had arrived, provided the further grounds did not alter the ground on which the decision proceeded—*Snadden* vs *Todd, Finlay & Co.*, 7 W. R., 286. This has been sometimes done on the original side; but it seems doubtful whether such a mode of procedure would have been countenanced by the Privy Council. Their Lordships, referring to a somewhat similar practice, said: "The rule requires the reasons given by the Judges to be communicated to the Registrar, and the observations made by Lord Kingsdown, in delivering the judgment of the Committee in *Brown* vs. *Gregory*, shew that these reasons ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal"—*Richer* vs. *Voyer*, L. R., 5 P. C., 481.

In England a Judge may always reconsider his decision until the order is drawn up —*In re St. Nadhaire Co.*, 12 Ch., Div. at p. 91.

Judgments of Small Cause Courts.

203. The judgments of the Courts of Small Causes need not contain more than the points for determination and the decision thereupon.

Judgments of other Courts.

The judgments of all other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

This section applies to M. S. C. C.

By section 359, Act VIII, 1859, it was declared that a judgment should contain the point or points for determination the decision thereon and the reasons for the decision, and it has been held that under this section Judges should distinctly record in their judgments the points to be decided, their findings on each point raised, and their reasons for them—*Mhajah Mahamed Gouhur Ali Khan* vs. *Ashrufoonissa*, 9 Moore, 503; *Chunder Kant Chowdry* vs. *Hurish Chunder Chowdry*, 1 W. R., 234; *Syud Lotif Ali Khan* vs *Syud Velayet Ali Khan*, 6 W. R., Act X, 115; *Shurbessur Ghose* vs. *Sadhoo Churn Ghose*, 15 W. R., 130; the more so as the conclusions of the lower Court on questions of fact are binding on the High Court in special appeal—*Kristnasamy Tatacharry* vs. *Gomatum Rungacharry*, 4 Mad., 63. In the case of *Kalchekaleyna Rungappa* vs. *Kacheujaya Rungappa Kalakke Tola Oodair*, 12 Moore, 503, in which the Judges of the High Court gave no reasons for their judgment, their Lordships of the Privy Council said: "Their Lordships have considered this case, and they must in the first place express their regret that the record contains no statement of the grounds of the decision of the High Court which is now under appeal. The Charter of the High Court of Judicature, section 42, expressly requires that the reasons of their finding should be recorded by the Judges and transmitted for the information of this Court, and it is the subject of great regret, especially in a case which comes before their Lordships *ex-parte*, that the grounds of the judgment appealed from should be wanting in the record. But in the absence of any such information, their Lordships must deal with the case as it appears on the record in the present suit." See also—*Ramasami* vs. *Bhas Karsami*, I. L. R., 2 Mad., at p. 70; *Ramasami Sigan* vs. *Venkataram Sigan*, I. L. R., 2 Mad., 91. And in another case they ruled that in all appealable cases the lower Courts should decide on all the issues fixed; since by forbearing to do so, they were often obliged to remand cases which might otherwise be finally decided on appeal—*Tarakant Banerjee* vs. *Puddomoney Dossee*, 5 W. R., P. C., 63.

Imperfect Judgment.—Where the judgment of the Appellate Court ran as follows: "This is a dispute as to whom a yard in front of a house occupied by the plaintiff belonged. The evidence is conflicting. The lower Court held that of the plaintiff to be the most creditable, and decreed in his favour. The defendants appeal on the merits. I see no ground to dispute the propriety of the lower Court's decision. The appeal is dismissed." It was held that simply recording the result of the Court's judgment that no grounds appeared to dispute the propriety of the lower Court's decision was not sufficient, as the section required the judgment should contain the points for decision, the decision and the reasons for the decision —*Rughobur Sahai* vs. *Chuttraput*, 2 Agra (F. B.), 73. So where the Judge having stated the claim and answer proceeded as follows: "Munsif decreed the case against which the defendant appeals. Now I have to see whose purchase is true, and before the dispossession who was in possession. From the plaintiff's registered kubala, chitta, kabooleut and witnesses, it has been proved that the plaintiff is the real purchaser and was in possession, and the kubala was registered some months after by Mohamed himself when the defendant registered his; after that again, the defendant to prove the gift has filed in this Court the Deputy Collector's roobakaree in which the gift appears; but that does not signify because the plaintiff's kubala is prior to that of the defendant; so the appeal is dismissed with costs." *Held*, he should not have confined himself to saying the plaintiff's evidence proved plaintiff's case, but should have stated what the evidence was and in what way and for what reasons it proved the plaintiff's case—*Trilochun Dutt* vs. *Ishen Chunder Chowdhry*, 3 W. R., 176. So where a Judge disposed of the case in the following words: "The execution of the defendant's deed of sale is proved, and the Munsif is altogether mistaken in alleging that there were any erasures in it"—*Imrit Singh* vs. *Koylashoo Koer*, 11 W. R., 559; or discredits witnesses without giving his reasons, as where he finds a lease not proved, because "beyond the oral evidence of the witness before whom it was executed, there is an absence of all corroborating evidence"—*Dhun Rae* vs. *Ramphul Rae*, 2 Alla., 109; or states that "the claim is absurd," or simply that "there is no proof of any just claim"—*Hem Chunder* vs. *Syed Ahmed Reza*, Marsh., 333; or that the defence is "ridiculous" or "absurd," without giving reasons—*Jugyessuree Debia* vs. *Godhadhur Banerjee*, 6 W. R., Act X, 21; or gives no opinion at all, but merely concurs with this first Court—*Ommutul Fatima* vs. *Mussamut Janee Khanum*, 1 W. R., 295; *Khelluck Chunder Ghose* vs. *Nund Ram Sein*, 2 W. R., 7; or merely says that he considers the "Munsif's decision fair and equitable;" in all these cases the judgments have been considered imperfect—*Kritna Reddi* vs. *Srinivasa Reddi*, 5 Mad. R., 174.

When a judgment is defective, and the same Judge is in office, the proper course is to remand the case, and direct him to record his decision—*Tatur Khawas* vs. *Loke Nath*, 15 W. R., 131; but if the Judge has left the district and a remand is necessary, a new trial should be directed, even though it may be on the evidence already recorded—*Nobo Chunder Banerjee* vs. *Ishur Chunder Mitter*, 12 W. R., 254; but see the case at 12 Moore, 503. In the case referred to above which the High Court remanded with directions that the Judge should record a proper judgment, and the Judge having been transferred his successor had the case re-argued and recorded judgment, it was held that effect should be given to the first thought defective judgment—*Kristna Reddi* vs. *Srinivasa Reddi*, 5 Mad., 174.

Improper judgments.—It is the duty of every Judge to proceed as far as the practice of his Court will allow him, to recall and cancel any order he has made—*Syed Taffazal Hossein*, vs. *Raghunath Prasad*, 8 B. L. R., 186; 14 Moore, 40. See on this point *Luchman Singh* vs. *Mohan*, I. L. R., 2 Alla., at p. 505.

Personal Knowledge.—A Judge should not, without giving evidence, import into his judgment his knowledge of any particular fact—*Hurpurshad* vs. *Shoe Dyal*, L. R., 3, Ind. App., 286. In a case in which the principal point at issue was the legitimacy of the plaintiff, and the Judge was influenced by the resemblance he bore to the person he claimed as his father, who had been personally known to the Judge, it was held that the decision of the Judge upon the personal resemblance could not be received or acted on by a Court of Appeal—*Jeswunt Singee Ubby Singjee and others* vs *Jet Singjee Ubby Singjee*, 3 Moore, 245 ; see also *Meethun Beebee* vs. *Bugheer Khan*, 11 Moore, 213. But where the Judge declared that certain persons were unworthy of credit, inasmuch as he knew them to be professional witnesses, and the Judges of the Suddar Dewanny censured him for making such an observation, their Lordships of the Privy Council said : "Their Lordships think it right to state that on that censure they do not at all concur. It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case that it is heard by a Judge acquainted with the character of the parties produced as witnesses, and who is capable, therefore, of forming an opinion upon the credit due to them"—*Bamun Doss Mookerjea* vs. *Mussamut Tarinee*, 7 Moore, 203.

Construction.—In construing a judgment, if a difficulty is found in reconciling the conclusion ultimately arrived at with a previous part of the judgment, such part must be rejected—*Bykunt Chunder Chuckerbutty* vs. *Dhunput Singh Bahadoor*, 19 W. R., 104 ; *Shurbeessur Ghose* vs. *Sadhoo Churn Ghose*, 15 W. R., 130.

Court to state its decision on each issue.

Exception.

204. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons thereof, upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit.

In appealable cases the lower Courts should, as far as practicable, pronounce an opinion on all the important points, since by omitting to do so a case may be remanded on appeal to the High Court or Privy Council, which might otherwise be finally decided on appeal—*Tarakant Banerjee* vs. *Poddomoney Dossee*, 5 W. R., P. C., 63.

The judgment in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made—*Eshan Chunder Singh* vs. *Samachurn Bhutto*, 11 Moore, 7 ; 6 W. R., P. C., 57.

Date of decree.

205. The decree shall bear date the day on which the judgment was pronounced ; and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

This section applies to M. S. C. C.

Under Act VIII, though Judges were bound to define clearly their intentions in a decree, the vakils were bound to see that the decrees were drawn up according to the terms of the judgments, but by the present section this labour is thrown upon the Judge. See *Ram Lochun Doss* vs. *Munsoor Ali*, 10 W. R., 96.

See notes under section 2, *ante*, and section 540, *post*.

Contents of decree.

206. The decree must agree with the judgment : it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim as stated in the register, and shall specify clearly the relief granted or other determination of the suit.

The decree shall also state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid.

Power to amend decree.

If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error: provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment.

This section applies to M. S. C. C.

Power to amend.—Application to amend must be made within three years—*Gaya Prasad* vs. *Sikri Prasad*, I. L. R., 4 Alla., 23. If an application for review is made on several grounds, and one of them refers to a clerical mistake, the application should be referred with leave to apply to amend the clerical error under this section; but if this is not done and the clerical error is amended on review, the decree then drawn up becomes the final decree, and an appeal will be against it if brought within time—*Joykissen Mookerjee* vs. *Ataoor Rohoman*, I. L. R., 6 Cal., 22.

Particulars of the claim.—The decree determines the right between the parties; and in order to determine what it really decides it is often essential to see what are the rights in dispute between the parties and what were alleged between them. Because if a decree gives the rights which are not properly in issue it is absolutely null and void—*Robinson* vs. *Duleep Singh*, 11 Ch. Div., at p. 833. All the material findings should be embodied in the decree—*Neamut Khan* vs. *Phadu Bubdea*, I. L. R., 6 Cal., 319.

Relief granted.—The decree must agree with the judgment, and under the last section the Judge should be satisfied of such agreement before he signs it. The relief granted should be consistent with the plaint and pleadings in the suit—*Eshan Chunder Singh* vs. *Shama Churn Bhutto*, 11 Moore, 7; 6 W. R., P. C., 57. A plaintiff should not get more than he has asked for. If he has assessed the rent on certain lands at Re. 1-8 per beegah, he should not be awarded Rs. 2 by the decree—*Ghyrullah Mundul* vs. *Kishorenath Koondoo*, 5 W. R., Act X 60; if he seeks for possession of land under a purchase from a widow in an undivided Hindu family, he cannot get a decree fastening the amount of a previous mortgage on the land, though the mortgage was part of the consideration—*Nadava Naikan* vs. *Appavu Naikan*, 2 Mad., 394; and where a person sued to recover land on a lease, defendant pleaded a sale, and the lease was found not to be genuine, but the land was decreed on the ground that, though there had been a sale, it had not been consented to by the proper parties and was invalid; it was held that, as no issue had been raised as regards the sale, and the plaintiff rested his claim on other grounds which had failed, the suit should have been dismissed—*Palaniyandi Kaundan* vs. *Muttusami Kaundan*, 2 Mad., 441. No decree should be given in favour of a person seeking a declaration where he is in possession of all his rights—*Padagalingam Pillay* vs. *Shanmugham Pillay*, 2 Mad., 333. As to changing the character of the suit, see section 80, *supra*.

Form of Decree—In a suit to recover possession of property held under a lease which had expired after the action had been brought, the decree should not be for possession; but that the plaintiff is entitled to possession up to the expiry of the lease—*Umanund Roy* vs. *Sreekishna Banerjee*, 7 W. R., 248; a decree to enforce a contract of hypothecation must state that the property shall be sold unless the debtor pays the amount with interest within a period to be named—*Chetti Gaundan* vs. *Sonaram Pillid*, 2 Mad., 55; *Solano* vs. *Moran & Co.*, 4 C. L. R., 11, and if the mortgagee of two properties seeks to enforce his charge against one after having bought the equity of redemption in the other, the decree should apportion the claim according to their relative values, and enforce the mortgage only to that extent—*Maharajah Kishen Pertab Sahee* vs. *Lalla Nund Coomar Singh*, 25 W. R., 388; a decree to redeem should give plaintiff recovery of the mortgaged property on the payment of the amount found due within a reasonable and defined period—*Shah Lutafut Hossein* vs. *Chowdhry Mahomed Mooneen*, 22 W. R., 269; in a suit by a second mortgagee against a third mortgagee and the mortgagor asking for an account and sale, the decreetal order should set forth what is due to the 3rd mortgagee as well as the plaintiff—*Auhindro Bhooseen Chatterjee and Johurry*, I. L. R., 5 Cal., 101; and if a plaintiff asks for two or more rights and only succeeds as to one, a declaration should be inserted in the decree barring his right to that which he had failed to establish—*Dhunput Sing Bahadoor* vs. *Narain Pershad Singh*, 20 W. R., 94. In a suit for contribution the decree should, if possible, declare the liability of each of the defendants—*Bhurut Padey* vs. *Mussamut Munthora Kooer*, 23 W. R., 421; a joint decree should not be given—*Mohadeo Misser* vs. *Lahoree Misser*, 24 W. R., 250. In a suit against a gomashta to obtain accounts, it is not sufficient to make a decree ordering the defendant to render nikash papers to the plaintiff: it is the business of the Court to examine the papers brought before it, and to determine whether they are correct and fair accounts between the parties—*Shushee Sheekur Audhikaree* vs. *Sidum*

Biswas, 22 W. R., 191, either directly or in the manner laid down in sections 394 and 395, *post*—*Annod Persad Roy* vs. *Dwarkanath Gangooli*, I. L. R., 6 Cal. 754; where a suit is dismissed on the plea of jurisdiction, the decree should state it was "dismissed for want of jurisdiction"—*Freck* vs. *Harley*, I. L. R., 6 Cal., 418.

The decree should be drawn up in one or other of the forms in the appendix. A copy of the judgment, with a schedule of costs attached, is not sufficient—*Purmessuree Dutt Jha* vs. *Joynath Thakoor*, 15 W. R., 326. No person takes under a decree unless it is given to him in the ordering part, even though his name is mentioned in it—*Nowab Syud Zoynul Ahdeen* vs. *Phoolash Chunder Bothrath*—15 W. R., 126; nor can anything be given unless the giver is expressly named—*Janokee Nath Mookerjee* vs. *Joy Kishen Mookerjee*, 15 W. R., 4. What is given and taken must be declared; even costs, though the judgment says that they should be given—*Nobo Kristo Mookerjee* vs. *Parbutty Churn Bhuttacharjya*, 11 W. R., 23; *Goluck Chunder Chowdhry Massunt* vs. *Chowdhry Gunga Narain Massunt*, 18 W. R., 111. Interest—*Mosoodun Lall* vs. *Bhukare Singh*, 16 W. R. Mis., 119 or mesne profits—*Chowdhry Nain Singh* vs. *Jawahree Singh*, 1 Alla., 246, or interest or mesne profits—*Mahomed Yakoob* vs. *Mahomed Zuhooral Hug*, 22 W. R., 533, ; which will not be allowed in execution even in Privy Council cases if not expressly declared—*Rajah Leelanund Sing* vs. *Court of Wards*, 24 W. R., 387; *Joykissen Bose* vs. *Wise*, W. R., 1864, Mis., 37; *Muddun Thakoor* vs. *Morrison*, 18 W. R., 253; but it is not necessary in an appeal decree that the specific sums which go to make up the costs should be set forth—*Hurre Kishore Roy* vs. *Mothoora Mohun Roy*, 17 W. R., 445, and 18 W. R., 286; and interest on costs forms no exception to the rule—*Forester* vs. *The Secretary of State*, L. R., 4 Ind. App., 137.

In the Mofussil Courts, the person declared liable must be a party to the record, though perhaps it may be otherwise on the original side of the High Court—*Jointee Chunder Sein* vs. *Anundo Lall Doss*, 14 W. R., A. O., 1; *Sreemutty Bama Sundary Dossee* vs. *Anundo Lall Doss*, Bourke, 44; he must also be alive when the decree passes—*Anund Roy* vs. *Thakoor Munorut Singh*, Marsh., 611. Further than this the rule does not go; and, though one defendant should not generally be made to pay another defendant's costs—*Ram Chunder Mitter* vs. *Kisto Kaminee Dossee*, 10 W. R., 194, he may be made do so, if he colludes with the plaintiff and makes him bring a suit for his benefit, and also to pay his own costs—*Bhyroo Raoob* vs. *Deo Narain Singh*, Marsh., 608; and where A sued B and a mortgagee of B's interest, the mortgagee believing in good faith that the property was that of B, the proper order was considered to be that the defendant should pay plaintiff's costs, and the mortgagee to recover his costs from B—*Ajuram Maniram* vs. *Kusaji*, 4 Bom., 43.

Imperfect decrees.—A decree-holder can receive only what is entered in the decree; and if the terms of the decree are so uncertain that it is impossible to ascertain what has been decreed, evidence cannot afterwards be taken to amend the uncertainty in the decree. The law expressly allows certain matters to be ascertained in execution, and beyond these it is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court in execution to decide what the Judge intended to decree—*Dwarkanath Haldar* vs. *Kamalakanth Haldar*, 3 B. L. R., App., 128; *Joytara Dassee* vs. *Mahomed Mobaruck*, I. L. R., 8 Cal., 975. And in execution a decree can not be altered or varied—*Mosoodun Lall* vs. *Bhukaree Singh*, (F. B.) 6 W. R., Mis., 109; *Pillai* vs. *Pillai*, L. R., 2 Ind. App., 219; *Forester* vs. *Secretary of State*, L. R., 4 Ind. App., 137; *Seth* vs. *Murli*, L. R., 5 Ind. App., 78.

A decree declaring that the defendant has a right of occupancy on payment of a proper rent without defining the rate of rent is defective—*Kalee Narain Singh Buroda* vs. *Chunder Narain Bukshee*, 23 W. R., 228; and so is a decree awarding mesne profits at the rate admitted by the defendants, and larger mesne profits contingent on a higher rate being proved in execution—*Syud Lotfoollah* vs. *Mussamut Nuseebun*, 11 W. R., 24; or for possession of a specific quantity of land without defining the boundaries—*Kangal Chundra Ruj* vs. *Kunje Lall Ruj*, I. L. R., 4 Cal., 64; or against a person deceased—*Anund Roy* vs. *Thakoor Munorut Singh*, Marsh., 611; or for exclusive possession of land not in the sole possession of the judgment-debtors, and shares of the different shareholders have not been defined—*Prosuno Coomar Dutt* vs. *Srebmutty Addessuree*, 18 W. R., 43; so also a declaratory decree regarding the possession of an idol from time to time by contending parties, which does not define the period of worship by each, and provide for the reconveyance of the idol is defective—*Ram Soondur Thakoor* vs. *Taruck Chunder Turkoruttun*, 19 W R., 28; and a prospective decree for contingent arrears of maintenance is bad; at most a declaratory decree can be given—*Raj Narain Doss* vs *Newton*, 6 Alla., 43.

The officer passing judgment is the proper person to construe it afterwards should any doubt arise as to its meaning—*Shaikh Cesharut Ali* vs. *Sha Gholam Nuzuf*, 4 W. R., Mis., 13; and when a decree requires amendment the party aggrieved should apply to the Court in which it was granted, and not appeal—*Cunwaree Chand Thakoor* vs. *Mudden Mohun Chuttoraj*, 21 W. R., 41; though apparently there is an exception to this rule Mofussil Courts have, after notice to the other side—*Mohunt Culoram Doss* vs. *Jogendro Nath Mullick*, 19 W. R., 349, amended decrees confirmed on appeal by the High Court—*Goluck Chunder Mussant* vs. *Gunga Narain Mussant*, 20 W. R., 111; but this is opposed to the view of their Lordships of the Privy Council in the case of *Kisto Kinker Roy*

vs. *Burrodhcaunt Roy*, 10 B. L. R., 101; see, also, the cases under "appellate decree," p. 169, *infra*. And if the vakils do not object to the particulars of the decree when brought to their notice, no appeal to amend will be listened to—*Prince Mahomed Ruhimoodin* vs. *Beer Protab Suhai*, 18 W. R., 303. Where the decree is imperfect and the Judge who pronounced it has left the district, and it is impossible to draw up a decree from the judgment, it seems there is no alternative but to order a new trial—*Kishen Dyal Lall* vs. *Moulvie Abdool Luteef*, 19 W. R, 267.

Interpretation—A decree must be construed as it stands, and should not be altered or added to—*Olfutoonissa Beebee* vs. *Akbur Ali*, 4 W. R., Mis., 20; or construed with reference to the plaint—*Nubo Kishore Mojoomdar* vs. *Anund Mohun Mojoomdar*, 17 W. R., 19; or interpreted by maps not mentioned in the decree itself—*Shiboo Soondry Dossee* vs. *Rama Soondry Dabee*, 18 W. R., 170; but see the cases of *Ram Lochun Doss* vs. *Munsoor Ali*, 10 W. R., 96; *Chunder Mohun Thakoor* vs. *Amrito Chunder Thakoor*, 19 W. R.; 343, and the better opinion is that the construction of a decree must be governed by the pleadings and judgment—*Robinson* vs. *Duleep Sing*, 11 Ch. Div. at p. 813; *Lochmon Singh* vs. *Mohon*, I. L. R., 2 Alla., 497. A decree for the "entire sum of money covered by the bond" means a decree for principal and interest specified—*Syed Shah Ali Ahmed* vs. *Bany Singh*, 18 W. R., 277.

A judgment giving a decree for "possession with wasilat," where the plaint gives no specific boundaries, means a decree for a share in an undivided estate and not for specific lands—*Ram Lochun Doss* vs. *Mansoor Ali*, 10 W. R., 960, the words "the plaintiff is to have judgment for his moiety with interest at the full legal rate, and the costs of the proceedings in the Court below," have been held to give plaintiff a decree for the moiety claimed by him, *i.e.*, the sum which he alleged to be due, for principal *plus* interest, with interest from the date of suit up to realization—*Gopee Kissen Gossamee* vs. *Brindabun Chunder Sircar*, 19 W. R., 41. Where the Judge, after finding a certain sum due, went on to decree costs and interest thereon, this was held not to justify a decree for interest on the sum decreed—*Kalee Nath Paul* vs. *Nuboddeep Chunder Sircar*, 17 W. R., 175, and if there is a set-off on account of costs, interest should only run on the amount after set-off has been deducted—*Amanut Ali* vs. *Mussamut Bindhoo*, 13 W. R., 138. In Privy Council cases where their Lordships direct a decree for a certain specified sum for costs *plus* costs, of the appeal to England, or costs in the Courts below, the latter clause covers the cost of translating the appeal record and its transmission to England—*Muddun Thakoor* vs. *Morrison*, 18 W. R., 253; *Asgur Ali* vs. *Nogendro Chunder Ghose*, 23 W. R., 463; *Sharoda Pershad Mullick* vs. *Luchmeeput Singh Doogur*, 18 W. R., 89; and in one case interest was allowed on them at 6 per cent. per annum, though not specifically declared—*Nil Madhub Doss* vs. *Bissumbhur Doss*, 21 W. R., 411; but see *Muddun Thakoor* vs. *Morrison*, 18 W. R., 253, *supra*. So if "interest," merely is decreed a reasonable amount it seems may be allowed—*Raja Rughonundun Singh* vs. *Arcott*, 19 W. R., 47, unless it appears from the calculation of the amount due what was the rate intended, when it will be allowed—*Syud Shah Abdoollah* vs. *Meer Reasut Hossein*, 17 W. R., 414.

A erected an embankment and prevented the influx of water into B's land. B sued A on this account and got a decree for the removal of the embankment. It was removed accordingly. A then erected another on a different spot which had, however, the same effect of keeping the water out of B's property. *Held*, the real object of the suit as well as the spirit of the decree was to prevent any obstruction on the part of A to the influx of water and not merely the removal of a particular embankment, and directed the removal of the second embankment in execution—*Roop Chunder Kopalee*, Petitioner, S. D. A., Sum. Decis., February 2, 1841.

In a suit for partition a compromise was filed agreeing that certain ascertained property should be divided in certain proportions, and certain other property not then ascertained should be divided in the same manner. The Court declared that a decree should pass in the terms of the compromise. *Held*, that it could only be executed against the ascertained property and was merely declaratory in regard to the property unascertained—*Ram Lapi Ram* vs. *Chooram*, 4 C. L. R., 97.

Effect of Decree.—As a rule a decree is only binding between the parties *principal and proforma*—*Trilochun Chukerbutty* vs. *Gobind Chunder Roy*, 1 Shome, 244 (see note under section 332, *post*), and their representatives; after decree representatives cannot open up the original proceeding—*Ram Bhunjun Singh* vs. *Mussamut Munder Keer*, 23 W. R., 127; and it creates an obligation, which is enforceable so long as the decree is not set aside in a suit instituted for that purpose—*Huro Chunder Biswas* vs. *Nobo Kishore Mookerjee*, W. R., 1864, p. 159; but it must be enforced in execution and does not support a new action—*Rash Munjoree Chowdhrain* vs. *Radha Soonduree Dossee*, 23 W. R., 283; *Mahunt Nursingh Doss* vs. *Moonshee Kamrooddeen*, 20 W. R., 413; and see note on the effect of a specific remedy at page 39, *supra*. Where a decree is joint and several, the fact that one debtor has paid his share of an instalment will not modify his liability if default be made by another judgment-debtor—*Salig Ram* vs. *Baboo Ram Sewuk*, 2 Agra., Mis., 14.

A decree by consent against one heir of a deceased Mahammadan debtor cannot bind the other heirs—*Issamatham Nissa Bibee* vs. *Hur Asbrup Ally*, I. L. R., 4 Cal., 142.

In certain cases though the form of the decree is that of a personal decree, the estate is looked on rather as a *persona*, and the judgment-debtor as its representative—*Rajah Debendra Narain Roy* vs. *Coomar Chundernath Roy*, 20 W. R., 30; and the decree should state whether it is personal or binding on the party as representative only—*Ram Kishore Chuckerbutty* vs. *Kally Kanto Chuckerbutty*, I. L. R., 6 Cal., 479; for unless it is manifest that he has been sued in the latter capacity the party to the decree can not bind the interests of others—*Loki Mahto* vs. *Aghorre Agail Lall*, I. L. R., 5 Cal., 144. A Hindu widow will, as defendant, represent and protect her husband's as well in respect of her own as of the reversionary interest, in any suit the object of which is to recover or to charge an estate, and a decree against her will bar the reversioners—*Nogender Chunder Ghose* vs. *Sreemutty Dossee*, 8 W. R., P. C., 17; *Natha Hari* vs. *Jamni*, 8 Bom., 37. Thus, when a widow is sued for the debt of her husband, the decree, although not in terms against her as representative of her deceased husband, or as guardian of his minor son, may be executed against the property of the deceased—*Ishan Chunder Mitter* vs. *Baksh Ali Sodagur*, Marsh., 514; so a decree against "Mussamut Chooharoo Kooer, mother and guardian of Hurpershaud, the minor son and heir of Gourepershad" for rent due in Gourpershad's lifetime bound his estate—*Manager of the Raj Darbanga* vs. *Maharajah Coomar Ramaput Singh*, 10 Ben., 295; and this doctrine has been driven so far as to hold that, in cases of this kind, all that is necessary to see is for whose debt the decree has passed irrespective of whether the lady is heir—*Hulkhory Lall* vs. *Sheo Churn Lall*, 24 W. R., 109; but this cannot be considered good law—*Poolbas Koonwur* vs. *Lalla Jogeshar Sahoy*, I Ind. Cal., 226. A decree against a Hindu widow who had adopted a son, for contribution on account of money paid to preserve the estate from auction sale for arrears, has been held to bind the estate—*Roop Mongooree Chowdhraine* vs. *Ram Lall Sirkar*, 1 W. R., 151.

As regards debts or charges contracted by a Hindu widow on the estate in her widowhood, it must be remembered that she possesses but a limited power of alienation—*Mussamut Bhagbutti Dasee* vs. *Chowdhry Bholanath Thakoor*, 24 W. R., 168; a personal decree against her, where no charge is declared on the estate, and the debt has been contracted in her widowhood does not bind the estate, but only her life interest—*Kisto Moyee Dassee* vs. *Prosunno Narain Chowdhry*, 6 W. R., 304, even though the debt could have been declared a charge on the estate—*Baijum Doobey* vs. *Brij Bhookun Lall Awasti*, 24 W. R., 307, for in such cases the suit being against the widow for her own debt, she cannot be said to defending as respecting the estate, but only as defending her own interest—*Mohima Chunder Roy Chowdhry* vs. *Ramkishore Acharjee Chowdhry*, 15 B. L. R., 160; (overruling—*Tiluck Chunder Chuckerbutty* vs. *Muddun Mohun Joojee*, 12 W. R., 504 and the judgment of Mitter, J., in *Raja Ram Banerjee* vs. *Sonatun Roy*, 23 W. R., 404). Further, if instead of protecting the estate, as she is bound to do, a Hindu lady seeks to destroy it by causing it to be sold for arrears of revenue, and a third party with such knowledge, saves it, he cannot bind the estate at all by any form of decree without making reversioners parties and giving them a chance to redeem—*Nugender Chunder Ghose* vs. *Sreemutty Dossee*, 8 W. R., P. C., 21; and the same result ensues if it appears that she allowed the decree to pass without a fair trial—*Bram Moye Dassee* vs. *Kesto Mohon Mookerjee*, I. L. R., 2 Cal., 222. And on the same principle, if a widow raises more money than she should, the estate cannot be destroyed under the decree—*Rajah Jha* vs. *Pabutty Ojhan*, W. R., 1864, p. 40, and the reversioners must get possession on paying the amount she could have probably raised, with interest—*Phool Chand Lall* vs. *Rughoobuns Sahaye*, 9 W. R., 108; though in such a case the alienation or charge was a good charge—*Muteeram Kowar* vs. *Gopal Sahoo*, 20 W. R., 187, and as to the form of decree where the charge is only good in part—see *Rajaram Tewari* vs. *Luchmen Prasad*, 4 B. L. R. (H.C.), 118; *Mussamut Phoolbas Coonwar* vs. *Lalla Jogeshur Sahoy*, L. R., 3 Ind. App., 27; I. L. R., 1 Cal., 226; *Bemola Dassi* vs. *Mohun Dossee*, I. L. R., 5 Cal., 792. The case of *The Collector of Masulipatam* vs. *Cavaly Vancata Narrainaph*, 8 Moore, 621, deserves particular mention. In it a decree was obtained against a widow for debts binding the estate; the decree charged the estate, and directed a sale. Subsequenty for the purpose of preventing the sale for the time, she mortgaged the property until the principal and interest should be paid to the mortgagee; the compromise was recorded and execution suspended, but owing to an order of Court the mortgagee never got possession. It was held, apparently on the ground that the compromise effected a novation, the creditor had only a lien on the estate for the amount of the mortgage. This whole doctrine, as I have pointed out above, appears to rest on the supposition that the widow represents the estate, and if the widow is not in such a position, if she is not heir, but has merely a right to maintenance, no decree against her could bind the reversioners—*Ramasami Chetti* vs. *Saluckai Tevar*, 8 Mad., 186.

A decree against Hindu for debt binds the estate as against his sons, and a purchaser under the decree need not go behind it—*Gridharee Lall* vs. *Kantoo Lall*, 14 B. L.

R., 187; 23 W. R., 260; and a decree against the son for his father's debts has the same effect unless the debts are immoral—*Muddun Gopal Lall* vs. *Mussamut Gowrunbutty*, 15 Ben., 265; L. R., 1 Ind. App., 128; *Suraj Bunsi Koer* vs. *Sheo Prasad Singh*, L. R., 6 Ind. App., 88; *Muttayan Chettiar* vs. *Sangili Vira Pandia*, L. R., 9 Ind. App., 128., *Doorga Persad* vs. *Kisto Persad*, L. R., 9 Ind. App., 27. Debts for nautches are not immoral or illegal—*Baddree Lall* vs. *Kantee Lall*, 23 W. R., 260; *Cheyt Narain Singh* vs. *Runwaree Singh*, 23 W. R., 395; *Mussamut Kooldeep Kooer* vs. *Ranjeet Singh*, 24 W. R., 231.

Money decree.—It is not unusual for a mortgagee or pledgee to waive his right to follow the property and sue for a simple money decree—*Fukeer Buksh* vs. *Chutterdharee Chowdhry*, 14 W. R., 209; unless he has deprived himself of the power by contract—*Webb* vs. *Rinchiden*, 14 W. R., 214. The effect of such a decree is not definitely settled, but it would appear that it only gives a personal remedy—*Baijun Doobey* vs. *Brij Bhookun Lall Amaste*, L. R., 2 Ind. App., 275; *Gouree Singh* vs. *Fuzl Hossein*, 15 W. R., 313; *Radha Koomar Singh* vs. *Luchmee Chand Marrowree*, 3 W. R., Mis., 16; and no charge can be sustained on the property mortgaged in execution—*Omrito Lall Sircar* vs. *Ramdhun Shakee*, 18 W. R., 503. (See, however, *Lalla Mitterjeet Singh* vs. *Scott*, 17 W. R., 62.) Nor can the decree be executed against the property but the lien may be enforced in a separate action—*Gupinoth Singh* vs. *Sheo Suhay Singh*, Ben. (F. B.), 72; *Soobuns Singh* vs. *Ishur Dutt Misser*, 21 W. R., 150; *Maharaj Dheraj Mahtab Chand Bahadoor* vs. *Hurdeo Narain Sahoo*, 16 W. R., 119; *Mohant Ram Rucha Doss* vs. *Doorga Dutt Misser*, 13 W. R., *Jonmejoy Mullick* vs. *Dossmoney Dossee*, I. L. R., 7 Cal., 714, 453, for sale or foreclosure only. Whether a second suit will be allowed under the Code is not quite clear. See note on section 43, page 69, *supra*, *Muluk Togneer Bulls vs. Lala Manohur Doss*, 2 Alla., 29; *Harkash* vs. *Tegraj*, I. L. R., 2 Alla., 345. See also the Transfer of Property Act, 1882, section 99.

As to the difference between a money decree and a decree declaring a lien see *Ram Nundun Rai* vs. *Lall Dhur Rai*, I. L. R., 3 Alla., 775; *Debi Churan* vs. *Perbhu Din Ram*, I. L. R., 3 Alla., 388. A declaration that plaintiff is entitled to obtain possession on payment of a certain sum, is a money decree in regard to that sum—*Ramanagra Singh* vs. *Ram Sad*, 5 C. L. R., 176.

Where a party having a lien on account of certain property belonging to another, and holding also a money decree for the same debt which she could satisfy by attachment and sale of other property belonging to her judgment-debtor, entered into a *kistbundi* with the latter, in which, in consideration of other properties pledged by its terms, she gave up the right of executing the decree against any of the judgment-debtor's property; *Held*, that the *kistbundi* did not extinguish the original debt or do away with lien—*Ram Churn Lall* vs. *Rughoobeer Singh*, 11 W. R., 481.

Kurta.—A decree against the kurta of a family or the manager of a minor, binds the estate when the charge is one that a prudent owner would make in order to benefit the estate—*Hunooman Persad Pandy* vs. *Mussamut Babooee Munraj Koonwaree*, 6 Moore, 393; *Ratnam* vs. *Gobinda*, I. L. R., 359; and in the case of a manager that in addition he has not exceeded the power given him by express enactment—*Dabee Dutt Sahoo* vs. *Subirda Bibi*, 25 W. R., 449. See also *Johoura Bibee* vs. *Sree Gopal Misser*, I. L. R., 1 Cal., 470, and *Ramlal Thakursidas* vs. *Luckmochand*, 1 Bom. App., 51 at p. 71.

And a decree in favour of or against one member of a joint and undivided family is often considered binding on all the others—*Deb Roy Kut* vs. *Fonendro Deb Roy Kut*, 14 Moore, 376; so it has been held that a decree for possession of land against a kurta, bound his adult nephew living with him—*Narayan Sop Habbu* vs. *Pandurang Saun*, I. L. R., 5 Bom., 685. Even in Bengal, the manager of a commercial concern can bind the members of his family interested in it—*Bemola Dossee* vs. *Mohin Dossee*, I. L. R., 5 Cal., 792.

Trustee.—A degree against a person cannot affect property held in trust by him if he is not a beneficial owner—*Mohaput Singh* vs. *Shaik Etbaree Chowdhry*, 19 W. R., 226.

Lien.—No lien can arise if the Court has not jurisdiction to bind real property, and this may happen if the Court is a Small Cause Court which cannot affect real property at all,, or the property is beyond the Court's local jurisdiction—*Luchmeenath Singh* vs. *Madhoo Dass Sahoo*, 2 Alla., 70; or the procedure followed is such as negatives the idea, that any lien can arise. No charge could be declared under the procedure in section 53, Act XX 1866—*Asma Bibee* vs. *Ram Kant Roy Chowdhry*, 19 W. R., 251.

Maintenance.—See *Abdool Tulleh Moodier* vs. *Labunessa Khabun*, I. L. R., 6 Cal., 631 ; *Thanna* vs. *Ramsarup*, I. L. R., 2 Alla., 777 ; and, if arrears are sued for, see *Rajah Pistu Singh* vs. *Ranee Raj Kooer*, 2 Alla., 179 ; *Tuleiba Chitta Kooer* vs. *Bhagee Kooer*, 6 Alla., 41.

Possession.—A decree for possession of land carries the buildings on it, and leave cannot be reserved to the person dispossessed to remove them unless he can shew that he builds them after exercising due care and caution as to the title—*Ramdhone Bhuttacherjee* vs. *Ishanee Dabee*, 2 W. R., Mis., 123. See also the note under section 207, *infra*.

Appellate decree—The decree in appeal should specify the relief granted ; "appeal decreed" is insufficient—*Hursarun Singh* vs. *Purshun Singh*, 2 Alla., 415. The appellate decree is the final decree and the only decree capable of being executed after it has been passed—*Arunachellathudayan* vs. *Veludanay*, 5 Mad., 215, whether it reverses, modifies or confirms that given in the Lower Court—*Ram Charan Bysak* vs. *Lykhi Cant Bannik*, 7 B. L. R., 740 ; *Chowdhry Wahid Ali* vs. *Mullick Enaet Ali*, 14 W. R., 288 ; *Joykishen Mookerjee* vs. *Ataoor Rohoman*, I. L. R., 6 Cal., 22 ; 6 C. L. R., 575 ; and care should be taken in drawing it up that it expressly embodies so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decrees—*Kistokinker Ghose Roy* vs. *Burrodacaunt Singh Roy*, 10 B. L. R., 101. But in a latter case the Bombay High Court held that an application for execution of a decree in the original suit and proceedings thereon which, without formally and expressly asking for the execution of the decrees in regular and special appeal, recognized those decrees and sought relief consistent with the final decree, can be viewed as a proceeding for executing the final decree—*Mir Ajumuddin* vs. *Mathuradas Govardhadas*, 11 Bom., 215.

Where two parties appeal, so that one is a cross-appeal to the other, there should be only one final decree between the parties—*Lalla Rughoobuns Sahoy* vs. *Mussamut Alsoo*, 20 W. R., 294. Plaintiff's suit being dismissed in the Lower Court, he appealed and got a decree for a portion of his claim with costs : respondent got costs for the portion disallowed. *Held*, that the respondent could not take out execution for his costs, as there was only one decree ; and that he could only execute for the sum remaining after deducting them from the amount awarded to him—*Issur Chunder Mookerjee* vs. *Mun Mohun Chowdhry*, 12 W. R., 308. As to the manner of entering costs in an appeal decree, see *Mothoora Mohun Roy* vs. *Hury Kishore Roy*, 18 W. R., 286.

The costs of proceedings in execution of a rent decree should not be added to the decree so as make it appealable under section 58, Act VIII of 1869—*Kadumbani Dabya* vs. *Kalylash Pal*, I. L. R., 6. Cal., 594.

An appellate decree cannot be reviewed by the Lower Court—*Onroet* vs. *Sunkur Dutt Singh*, 14 W. R., 26 ; *Chowdhry Wahid Ali* vs. *Mullick Enaet Alae*, 14 W. R., 288.

Decree for recovery of immoveable property.

207. When the subject-matter of the suit is immoveable property, and such property is identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

This section applies to H. C.

A decree may be passed in favor of the defendant on the ground of long possession (if the fact of long possession has been found), though a specific title has been set up as a defence—*Shib Chund Lahiri* vs. *Joymala Dasi*, 7 C. L. R., 103.

A decree should, on the face of it, shew distinctly and accurately the property affected by it—*Srishteedhur Bhuttacharjee* vs. *Kalee Doss Dey*, 24 W. R., 479 ; it should specify the land awarded—*Madhoo Singh* vs. *Mujoo Khan*, S. D., N. W., 1853, p. 277, and its boundaries—*Mahomed Ismail* vs. *Lalla Dhundur Kishore Narain*, 25 W. R., 39. So a decree for 7 khadas, 14 pakees, 12 kanees of land, out of a larger plot, or for 6 kanees, without boundaries, cannot be executed—*Darbaree Sayal* vs. *Fatu Jhalee*, 23 W. R., 285 ; *Dwarkanath Roy* vs. *Jannobee Chowdhrain*, 19 W. R., 81.

Effect of—A party having obtained a decree for possession cannot bring a second action against the defendant for the same property unless upon a cause of action that has arisen

after execution: he must execute his decree—*Mohunt Nursingh Doss* vs. *Moonshee Kumrooddeen*, 20 W. R., 413. See note on the effect of a specific remedy at page 39, and note under section 206, *supra*.

A decree for possession of land does not always carry the buildings erected on it by the person in possession. The general rule is that, if the person making the improvements is not a mere trespasser, but is in possession under any *bonâ fide* titlé or claim of title, he is entitled either to remove the materials, restoring the land into the state it was in before the improvement was made, or to obtain compensation for the value of the building, if it is allowed to remain for the benefit of the soil, and the decree-holder has the option of either taking the building, or allowing the removal of the materials if the building has not been taken down by the losing party during the continuance of his estate.—In the matter of the petition of *Thakoor Chunder Paramanick*, Ben., F. B., 595. Good faith is more than the absence of bad faith. Nothing is done or believed in good faith which is done or believed without due care and caution. Where the reversioners of a Hindu widow sued a person claiming under her by purchase, it was held that defendant could not claim the buildings, as it was the first duty of a purchaser from a Hindu widow, or a purchaser from such a purchaser, to satisfy himself as an ordinary prudent owner would do, as to her right to sell —*Ramdhone Bhuttachrjee* vs. *Ishanee Dabee*, 2 W. R., 123. See *Juggut Mohinee Dossee* vs. *Dwarka Nath Bysack*, I. L. R., 8 Cal., 582.

If a member of a joint Hindu family builds a brick house on the ancestral land, and his co-parceners sue for partition, they cannot claim any property in the house, and can only demand other similar land of equal amount—*Khoderam Surma* vs. *Trilochun*, 1 Sel. R., 85.

A decree for "possession and wasilat" merely without specifying the lands, and no boundaries are given in the plaint is a decree for possession of an undivided share—*Ram Lochun Doss* vs. *Munsoor Ali*, 10 W. R., 96.

Plaintiff sued for one-third of certain plots, but the Munsif changed the nature of the suit and gave her a decree for one-third of all lands devolving under the same title, part of which were in her possession. In execution defendant objected that the plaintiff should first execute the decree in respect of the lands in his own possession; but it was held that he could execute it against all the land in the defendant's possession—*Radha Kristo Panjah* vs. *Bama Soonduree Dossia*, 13 W. R., 9.

Decree for delivery of moveable property

208. When the suit is for moveable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had.

This section applies to H. C. and M. S. C. C.

In a suit for partition of moveables, defendant objected to the accuracy of the list of moveables filed by the plaintiff, and the Judge, without determining whether the list was correct or not, decreed the claim and declared that objections regarding any article would be heard in execution of degree. It was held that he should have framed an issue and decided the question before he gave a decree—*Sheo Gobind* vs. *Sham Narain Singh*, 7 Alla., 75.

The payment of money is only an alternative form of relief, and should not be enforced unless delivery cannot be had under the decree—*Kashee Nath Kooer* vs. *Deb Kristo Ramanooj Doss*, 16 W. R., 240. The amount to be paid is generally the value of the property *plus* damages for the time the plaintiff has been kept out of it—*Bombay Trading Corporation* vs. *Mirza Mahomed Ali Sherazee*, 19 W. R., 123; *Kashee Nath Kooer* vs. *Deb Kisto Ramanooj Doss*, 16 W. R., 240.

In suits for money, decree may order certain interest to be paid on principal sum adjudged.

209. When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

This section applies to H. C. and M. S. C. C.

This section does not give the Court discretion as to the rate to be adjudged from the date of suit to the date of the decree when the parties have specially contracted the one to pay the other to receive a fixed rate; but merely to give the Court power to award interest after the institution of the suit in an ordinary action for money due where there has been no contract—*Dhunput Singh Dogare* vs. *Shaikh Golam Hyder*, 2 Hyde, 106; the contracted rate must be awarded up to the date of the decree—*Bhugwan Doss* vs. *Tekait Narain Deo*, 23 W. R., 309; *Shaikh Reasut Hossein* vs. *Juswunt Roy*, 15 W. R., 396; *Mirtunjoy Chuckerbutty* vs. *Cochrane*, 10 Moore, 251; *Kotoo & Mah Ngwai* vs. *Ko Pay Yah*, 6 W. R., 254; *Kalica Prosaud Misser* vs. *Gobind Chunder Sein*, 2 W. R., Ref., 1, even though it is compound interest—*Smith* vs. *Patton*, S. D., N. W., 1862, p. 60, *Bandaree Swanee* vs. *Atchayamma*, I. L. R., 3 Mad., 125 (see, however, *Carvalho* vs. *Nurbibi*, I. L. R., 3 Bom., 202), unless fraud is established—*Shah Koondun Lall* vs. *Rajah Ameer Hussun Khan*, 11 Moore, 127, or the contracted rate is unconscionable, such as 12½ per cent. per month—*Kuar Luchman Singh* vs. *Pirbhu Lal*, 6 Alla., 359 (75 per cent. yearly is not—*Omda Khunum* vs. *Brojendro Coomar Roy*, 12 B. L. R., 477) or amount to a penalty, such as a higher rate on default—*Bihari Lal* vs. *Mussamut Jani*, 7 Alla., 108; *Omda Khanum* vs. *Brojendro Coomar Roy Chowdhry*, 20 W. R., 317; *Hurree Nath Doss* vs. *Kalee Pershad Roy*, 22 W. R., 474; *Bhichuck Nath Panday* vs. *Ram Lochun Singh*, 19 W. R., 271; 11 B. L. R., 135; *Brojo Kishore Roy* vs. *Madhub Pershad Misser*, 12 B. L. R., 476; or if the interest is greater than the principal and the plaintiff is a Hindu in Madras—*Kakarlapudi Sitaramaraj* vs. *Uppalapudi Janajayya*, 1 *Mad.*, 5, or Bombay—*Kushalchand Lalchand* vs. *Ibrahim Fakir*, 3 Bom., 23; otherwise in Bengal—*Deen Dyal Paramanick* vs. *Pal Chowdhry*, 24 W. R., 106; and the North-West—*Kuar Luchman Singh* vs. *Pirbu Lal*, 6 Alla., 359. But after the decree the contract ceases, becomes merged in the decree, and the plaintiff recovers only such interest as according to the course and practice of the Court is allowed on debts for which the creditor has the security of its decree—*Rashessur Surmah* vs. *Kaleekanath Surmah*, 11 W. R., 455 (see, however, the case of *Noboo Coomar Bose* vs. *Gobind Chunder Poddar*, 17 W. R., 431, in which this distinction seems to have been lost sight of). Interest on the amount decreed cannot be objected to on the ground that it is compound interest—*Jodoo Nath Roy* vs. *Dwarkanath Chatterjee*, 1 W. R., Mis., 15; *Nund Kishore Singh* vs. *Reza Ismed Kooer*, 20 W. R., 189; 3 H. Court Cir., 1866.

A condition in a decree payable by instalments that in default of payment of any two instalments, the whole amount due and *increased* interest should be at once recoverable is not a penalty—*Run Bahadoor Singh* vs. *Roy Narain Doss*, 7 C. L. R., 82.

Where a decree is silent as to interest it cannot be allowed for the period between the date of the suit and the decree, but future interest may be obtained in a separate action—*Seth Gopal Doss* vs. *Murli*, I. L. R., 3 Cal., 602; but see *Bany Madhub Trivade* vs. *Ram Gopaul Sircar*, 3 C. L. R., 523.

In a case in which the Privy Council decreed an account to be taken against a person, but without interest, it was held to mean that interest was not to be given on arrears of mesne profits, but that the direction did not prevent interest on the sum decreed, being allowed from the date of decree to the date of payment—*Raja Ahmed Reza* vs. *Mussamut Khujorunnissa*, 15 W. R., 469.

Where there is no express agreement to pay interest, it may be awarded if there is any such mercantile usage, such as 9 per cent. on all book debts in Bombay—*Ram Lal* vs. *Dulab Das*, Perry's O.C., 220; 5 Moore, 136; otherwise in Calcutta—*Joy Narain Bhuggut* vs. *Kashee Chowdhry*, 16 W. R., 148; *Juggomohun Ghose* vs. *Kaisrechund*, 9 Moore, 256. Interest runs on hoondees drawn at 111 days' sight in Moorshidabad —*Dhunput Singh Doogur* vs. *Maharajah Jugut Indur Bunwaree*, 4 W. R., 85.

Interest after due date.—When a rate of interest is not stipulated for till realization, but to a certain date, if the money is not paid on the fixed day, the principal and interest become from that time a debt, which, when recovered by process of law, may, in the discretion of the Court, be made the subject of an additional penalty for the breach; but there is no implied contract for the continuance of the same rate of interest—*Cook* vs. *Fowler*, L. R., 7 Eng. & Ir. App. 27; *Deen Doyal Lal* vs. *Het Narain Singh*, I. L. R., 2 Cal., 41; *Joy Ram Gossamee* vs. *Nobin Chunder Doss*, 25 W. R., 318. If the debtor has continued to pay the same rate of interest after the due date, this will be evidence in support of holding that interest is a fair measure of the damages suffered by the creditor—*Mirza*

Mahomed Hossein vs. *Shahzaddah Fuqueeroodeen Saheb*, 15 W. R., 284: but there is no fixed rate, and if the contracted rate be exorbitant, the Court should only allow a fair and reasonable rate after the day on which the money has become due—*Moizooddaу Shaikh*, Petitioner, 14 W. R., 450.

By Act XXXII, 1839, it is enacted "that, upon all debts or sums certain payable at a certain time or otherwise, the Court, before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable; if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when the demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." This is an enabling Act and does not restrain a Court from allowing interest in other cases in which interest was allowed before the Act—*Golam Ahmed Shah* vs. *Beharyloll*, Marsh., 239, as, for example, cases for contribution, where it has always been allowed unless plaintiff has slept over his rights—*Bistoo Chunder Banerjee* vs. *Nithore Monee Debie*, 19 W. R., 98; *Nullit Biswas* vs. *Prosunno Moyee Dossee*, 17 W. R., 179. The Act extends to debts or sums certain, but not to unascertained balances—*Hill* vs. *South Staffordshire Railway Co.*, L. R., 18 Eq., 154; nor to debts contingent as to amount and time of coming due—*Juggomohun Ghose* vs. *Manick Chund*, 7 Moore, 263; nor where the parties have regulated the amount of interest by contract, for then interest is as much payable as the principal—*Bunwaree Lall Sahoo* vs. *Moheshur Singh*, Marsh., 544; *Murtunjoy Chuckerbutty* vs. *Cochrane*, 10 Moore, 229; but it applies to cases in which the date is made certain with reference to a certain time or event, the date of which can be ascertained afterwards, and it does not require that the day of payment should be mentioned in the instrument—*Duncombe* vs. *The Brighton Club and Norfolk Hotel Co.*, L. R., 10 Q. B., 371: though, on the other hand, it has been held not to cover a note payable on demand—*The Bank of Hindustan and China* vs. *C. B. Wilson*, 1 B. L. R., 41. A summons is a demand within the section—*Ex-parte Alison*, L. R., 15 Eq., 394, and where no previous demand has been made, interest can only be given from the date of the suit—*Abdool Kureem Khan* vs. *Shaik Mea Jan*, 6. W. R., 288; *Mussamut Patsahee Dobain* vs. *Baboo Hurdeo Narain Sahoo*, 24 W. R., 457. The amount of interest is within the discretion of the Judge—*Seetanath Bose* vs. *Mothooranath Roy*, 11 W. R., 68; and should not be interfered with on appeal unless the Court below, acting either through prejudice or misunderstanding, has committed injustice, and even then it appears that the Privy Council would not decree the point but direct a new trial—*Juggomohun Ghose* vs. *Kaisamchand*, 9 Moore, 263, 282, and this is apparently the only proceeding open to the High Court in special appeal.

Interest Allowed.—Interest has been allowed when the plaintiff has been opposed in following a sum in execution—*Parbutty Churn Soor* vs. *Promothonath Ghose*—W. R., 1864 p. 174; or deprived of money actually making interest—*Miller* vs. *Barlow*, 14 Moore, 233; to a mortgagee on account of putni rents paid by him—*Brojonath Singh Rai* vs. *Sreemutty Bhugobutty Dassee*, 1 W. R., 133; from a mortgagee retaining possession after payment—*Esree Singh* vs. *Sheo Sahoy*, S. D., N. W., 1864, p. 438; but not from an agent retaining money not demanded—*Turner* vs. *Burkinshaw* L. R., 2 Ch., 488; interest has been allowed on rents exacted contrary to a decree—*Tara Monee Dassia* vs. *Mackintosh*, 9 W. R., 272; on money ordered to be deposited, and no deposit made, from the date of order—*Ramdass Gossamee* vs. *Prossunno Moyee Dossee*, 16 W. R., 297; on the interest of Government promissory notes improperly retained—*Tarucknath Mookerjee* vs. *Gouree Churn Mookerjee*, 3 W. R., 117; and even if no mention is made of interest in the document, yet if the parties have treated the same as bearing interest, the party who has paid it may be estopped from denying it is due—*Gunga Phul Ojha* vs. *Gopol Oopadhaya*, 1 W. R., 136; on the other hand if a person is entitled to interest under a decree, he does not lose it by agreeing to take payment in instalments—*Mohanund Mojoomdar* vs. *Purtab Chunder Singh*, 6 W. R., Mis., 121; and where there was an agreement to pay interest at 5 per cent. and A subsequently verbally agreed to give 8 per cent. and voluntarily debited himself at 8 per cent. instead of 5 it was held 8 per cent. could not be enforced, as the agreement was a *nudum pactum*—*Guthrie* vs. *Lister*, 11 Moore, 129; 6 W. R., P. C., 59.

Defendant, as nearest of kin, had assumed charge of a minor's estate, carried on his banking business with his capital and kept a strict account of profit and loss. *Held*, the minor was not entitled to interest on the capital, but only the profit

actually realized, and they could not charge commission—*Sohun Lall* vs. *Moolchund.* S. D., N. W., 1862, p. 212.

Where the rate of interest given is not specified in the decree, the Court will give the court-rate usual at the time of making the decree—*Madhub Lall Khan* vs. *Noyan Ghose,* 6 C. L. R., 231.

Hindu Law.—By Hindu Law arrears of interest more than sufficient to double the principal sum are not recoverable—*Ram Conoy Audhicary* vs. *Johur Lall Dutt,* 7 C. L. R., 201; in the case of a mortgage—*Ganpat Pundurang* vs. *Adarji Dadabhai,* I. L. R., 3 Bom., 312. This rule does not apply where the defendant is not a Hindu—*Nanchund Hansraj* vs. *Bapusahib Rustambhai,* I. L. R., 3 Bom., 131.

Interest disallowed.—Interest has not been allowed on a bond specially registered; unless it expressly states that it carries interest after due date: it is to be enforced as a decree—*Kallooram Baboo* vs. *Doorga Nath Talookdar,* 10 W. R., 175; nor on a debt or law suit purchased for a small consideration, and the claim is left outstanding for some time—*Annoda Soonduree Dassee* vs. *Oudhub Nath Roy,* 10 W. R., 125; nor can it be realised from a defaulting purchaser under the Code on the difference between the first and second purchase-moneys—*Soorj Buksh Singh* vs. *Sreekishen Doss,* 9 W. R., 500; nor is it allowed on money deposited under a decree subsequently reversed, where the suit is not improper or vexatious—*Ashruffunnissa Begum* vs. *Mussamut Khanum Jaun,* 6 W. R., 285.

An offer of part payment will not stop interest—*Kunhya Singh* vs. *Tooydun Singh,* 7 W. R., 20; nor will a payment into Court by way of security until final decision which cannot be withdrawn by the plaintiff—*Barrows'* case, L. R., 3 Ch., 787. Formerly a deposit in Court would not stop interest unless the deposit was such as might be reasonably made, and the creditor did not refuse to receive part payment—*Pares Nath Mookerjee* vs. *Kristo Mohun Shaha;* 3 B. L. R., App., 105; and where the debtor made an honest offer to pay the sum due on the production of the proper authority for its receipt—*Garuda Reddi* vs. *Gudi Janakayya Garu,* 1 Mad., 124, or deposited in Court and gave notice to the other side, no further interest could be claimed—*Kalee Dass Ghose* vs. *Puran Koomaree Bibee,* 16 W. R., 304; but for the present law see section 367-8, *infra.*

Where a decree treats an estate as primarily liable to discharge a debt with interest, the proprietor (or his heirs) has a perfect right to pay the money into Court to protect himself from being made responsible, indemnify the sureties; and if the money is deposited it is unnecessary for the Court to enquire whether it was deposited under authority from the proprietor or his heirs—*Bissessur Singh* vs. *Nim Chand Bose,* 12 W. R., 505.

A note of hand promised repayment with interest at 5 per cent. without either stating per mensem or per annum. *Held,* the ambiguity might be explained by previous transactions between the parties and by custom—*Mahomed Shamsooddeen* vs. *Abdool Huq,* W. R., 1864, p. 379.

Interest should not be allowed after the time the plaintiff might or ought to have put up the property for sale and possibly might have realised the whole amount due—*Ramanund Koondoo* vs. *Chowdhry Somder Narain Sarungy,* P. C., Nov. 1878.

As against a *bonâ fide* purchase from a mortgage, without notice of the mortgage, the Court may refuse to give to a mortgagee interest at the rate stipulated in the mortgage for the period after the institution of the suit—*Carvalho* vs. *Nurbibi,* I. L. R., 3 Bom., 202.

Rent.—By law arrears of rent are liable to interest at the discretion of the Court up to 12 per cent. from the end of the year—*Beckwith* vs. *Kisto Jeebun Buckhsee,* Marsh., 279, and in a suit for arrears at enhanced rate from the due date—*Khajah Asanoolah* vs. *Kajee Aftabooddeen,* I. L. R., 4 Cal., 594, whether contracted for or not—*Lalla Sheo Sahoy Singh* vs. *Kummarunnissa Begum,* 2 W. R., Act X, 68; but interest is not allowed on instalments before the end of the year unless the parties have so agreed—*Bharutt Chunder Roy* vs. *Bepin Beharee Chuckerbutty,* 9 W. R., 495; nor on arrears at enhanced rates, the rates being determined by the Court—*Kumeera Khatoon* vs. *Baboo Gopal Loll Tagore,* 1 W. R., 58. But where plaintiff having obtained a resumption decree sued to assess the lands, and, obtaining a decree, sued for arrears with interest from the date of the assessment decree, it was held that he was entitled to interest—*Ramjeebun Bose* vs. *Tripoora Dassee,* Marsh., 396. The right to interest is not lost by not claiming it for broken periods—*Rutty Kant Bose* vs. *Gungadhur Biswas,* W. R., F. B., 13, and see—*Nahora Roy* vs. *Rajah Radha Prosad Singh,* I. L. R., 5 Cal., 64; 4 C. L. R., 353.

210. In all decrees for the payment of money, the Court may for any sufficient reason order that the amount shall be paid by instalments, with or without interest.

Decree may direct payment by instalments.

And after the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that the amount decreed be paid by instalments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him, or otherwise, as it thinks fit:

Order, after decree, for payment by instalments.

Save as provided in this section and section 206, no decree shall be altered at the request of parties.

This section applies to H. C. and M. S. C. C.

Decrees for the Payment of Money.—In the case of *Binda Prasad* vs. *Madho Prasad*, it was suggested that this section might only apply to what are known as money decrees; but this suggestion was not accepted. This section applies to cases referred to in section 58, Act VIII of 1869—*Gureebullah Sirkar* vs. *Mohun Lal*, I. L. R., 7 Cal., 127; 8 C. L. R., 409. It does not refer a suit for the recovery of a bond debt by sale of the immoveable property—*Hardeo Das* vs. *Huham Singh*, I. L. R., 2 Alla., 320; nor to enforce a lien on an annuity called *nunkur*—*Buchchu* vs. *Madad Ali*, I. L. R., 2 Alla., 649.

This section confers no authority on the Courts to relieve a contracting party from an express stipulation, in a bond payable by instalments, as to the consequence of default in punctual payment of the instalments—*Ragho Govind Paranjpe* vs. *Dipchand*, I. L. R., 4 Bom., 96.

Paid by instalments.—If sufficient reason has been shewn, the Court may decree that the amount shall be paid by instalments, and this procedure should be adopted when the defendant shews *bonâ fides*, by offering to pay anything like a fair proportion of his debt at once—*Subatollah Sircar* vs. *T. A. Thompson*, 1 Hyde, 98; or if his inability to pay arose from civil disturbances and not the ordinary vicissitudes of trade—*Khoda Buksh and others* vs. *Abdool Rahman*, S. D., N. W., 1863, p. 489; otherwise, if the judgment-debtor has failed to fulfil his ordinary engagments, for then *primâ facie* he is deserving of no further indulgence—*Nawab Jufree Begum* vs. *Ahmed Hossein Khan*, 2 Agra, 270. But after decree no such declaration can be made unless for the correction of errors—*Lall Mahomed* vs. *Shona Jolla Gazee*, 2 W. R., Ref., 3; or where the omission to make the order has arisen from any mistake, or it is otherwise necessary for the ends of justice to review it, or the parties consent—*Ravichand Dalichand* vs. *Motilal Narbheram*, 4 Bom., 77; *Sreemuty Judoobunsee Bhugtahe* vs. *Ranee Sreemutty Mukhn Kowaree*, 1 W. R., Mis., 6; *Smith* vs. *Gladwin*, S. D., N. W. 1864, p. 37; so where a judgment-debtor on security obtained an *ex-parte* order modifying a decree and enabling him to pay in instalments without the decree-holder's consent, it was held that the order did fall under this section—*Khubchand* vs. *Narain Singh*, I. L. R., 3 Alla., 812.

The power given under this section should be exercised with a due consideration for the interests of the creditor as well as those of the debtor. Thus an order allowing nine years to pay a debt of Rs. 440 has been reversed in special appeal, and the period reduced to 4½ years—*Koower Sain and others* vs. *Kishun Lall*, S. D., N. W., 1861, p. 656; and so a decree, directing the payment of Rs. 408 in yearly instalments of Rs. 50, was varied to a yearly payment of Rs. 70 on Rs. 293, with a provision that, in default of two payments, the decree-holder would be at liberty to take out execution for the whole debt—*Baboo Hur Gobind* vs. *Mussamut Hurkho*, 1 Agra, 116.

In decreeing instalments, the Court is not bound to direct that they shall carry the stipulated rate of interest—*Carvalho* vs. *Nurbibi*, I. L. R., 3 Bom., 202.

A decree directing payment by instalments can be executed to the extent of the instalments not barred by limitation—*Tincowree Dassee* vs. *Umbica Churn Roy Chowdhry*, 23 W. R., 41; *Woopendro Mohan Tagore* vs. *Takelia Beparee*, 11 W. R., 570;

and if it contain a clause empowering the decree-holder in case of default to execute the whole decree at once, or recover each instalment as it falls due, he may elect to adopt the latter course—*Kristo Chunder Shaha* vs. *Oomedali*, 14 W. R., 414; but in a later case where a consent decree for instalments was passed, it was held that section 23, Act IX, 1871, applied, and, on default of payment of one instalment, the whole amount becomes due, and, if not realized, is barred—*Raghoo Nath Doss Cookman* vs. *Ranee Sheromonee*, 24 W. R., 20; so where an agreement to pay in instalments was ratified by the Court executing the decree; but execution was not proceeded within three years the decree was barred—*Billings* vs. *Stowell*, I. L. R., 1. Alla., 350; and see *Asmutullah Dalal* vs. *Retecharn Mitter*, I. L. R., 7 Cal., 56; *Deelsook Ratan Chand* vs. *Chugon Narran*, I. L. R., 2 Bom., 356; but see the case of *Karee Kavalsa Appaya* vs. *Karnaram Papayya*, I L. R., 3 Mad., 257; and *Eathamukala Subbamah* vs. *Ragiah*, 7 Mad., 293; *Koylash Chunder Doss* vs. *Boikunta Nath Chundra*, 2 C. L R., 167; I. L. R., 3 Cal., 619, where it was held that the stipulation on default was one entered into merely for the benefit of the promisee, and which he therefore might waive, on the principle, *quilibet potest renunciare juri pro se introducto*. From these cases it seems that the legal effect depends upon the precise words of the stipulation.

A judgment-debtor ordered to pay by instalments defaulted, but subsequently paid the amount into Court, and it was taken out by the execution creditor. *Held*, the latter could not execute until a new default was made—*Hur Pershad* vs. *Khowanee*, 5 Alla., 18.

Instalments should, as a rule, carry interest, but if such be the intention it should be expressly declared. Otherwise it cannot be allowed in execution, even though on particular occasions it has been claimed and allowed—*Surno Moyee Dassee* vs. *Kishen Coomaree Bibi*, 14 W. R., 324; but if interest is allowed and default is made, the Court should sell the property of the defendant or his surety, and not adopt the tedious process of realization through a receiver—*Surno Moyee Dassee* vs. *Kishen Coomaree Bibi*, 14 W. R., 324.

Modification by consent of parties.—The cases on the power of parties to modify a decree by consent have not been uniform. In Bengal the conflicting decisions were settled in the Full Bench case of *Kristo Komal Singh* vs. *Huree Sirdar*, 13 W. R., F. B., 44; 4 B. L. R., F.B., 101. In that case the decree-holder and debtor, many years after the decree, filed a kistbundi, whereby they agreed that the amount due under the decree should be paid by instalments. Three years after the first instalment was due, but more than three years after the last proceeding, the decree-holder asked for execution, and it was held that he was barred. Peacock, C.J., delivering the opinion of the majority, said: "It appears to me that a Court of Execution has no power to alter a decree of the Court which passed it, and that parties cannot alter the law or a decree of the Court itself * * * *; if a man binds himself not to execute a decree within a certain period, he must take care, if he wish to execute it at all, not to bind himself, not to execute the decree for a longer period than that within which the law would allow him to execute it." This case then decided that parties by agreement could not alter the Statute of Limitations, and threw out the opinion, not necessary for the decision of the case, that a decree could not be varied by consent of parties; and it is now clear that parties cannot by agreement avoid the effect of the Statute of Limitations—*Stowell* vs. *Bellings*, I. L. R., 1 Alla., 350; but an action for damages will lie for breach of an agreement not to take advantage of the Statute—*The East India Company* vs. *Odit Churn Paul*, 5 Moore, 43. In the case of *Ekowri Singh* vs. *Bejaynath Chattopadya*, 4 B. L. R., 114, Markby, J., held; "The only point upon which I have felt the smallest doubt is as to whether or no the conduct of the defendant in the subsequent suit in having, as I think pretty clearly he had, contended that mesne profits were given in the first suit could in any way affect the position of the parties; but on consideration I think it clear that it could not. I think it a clear principle of law that parties cannot, either by special agreement or any conduct of their own invoke the process of the Court in execution. Process of execution must always be granted by the direct act of the Court itself. And it appears to me that, precisely upon the same principle that parties are prohibited making the process of the Court *de novo* either by agreement or by their conduct, they are prohibited from extending in like manner the relief which the Court has chosen to award. Therefore, all questions as to the conduct of parties when they are seeking to execute a decree of the Court are, in my opinion, immaterial in considering what is the effect of the decree." On the same principle it has been held that a Court cannot execute a decree on the footing of a kistbundi, but only the original decree—*Madhub Chunder Dundput* vs. *Madhub Lall Khan*, 15 W. R., 542; and the same opinion has been expressed by

Markby, J., in *Ram Runjan Chuckerbutty* vs *Rajah Jowhurrenaib Khan*, 23 W. R., 129. There have been, however, decisions to the contrary, founded upon other cases, in the English Courts, in which a Judge has by consent decided facts which ought to be disposed of by a jury—*Bickett* vs. *Morris*, L. R., 1 H. L., 47; *Stewart* vs. *Forbes*, 1 Mac. & G., 145; *Morris* vs. *Davies*, 5 Cl., & F., 163; and, instead of dismissing a suit, has proceeded on consent to decide the adverse claims of the defendants, even though some of them were minors—*Pisani* vs. *Attorney-General of Gibraltar*, L. R., 5 P. C., 516. In the case of *Sadasiva Pilla* vs. *Ramalinga Pillai*, L. R., 2 Ind. App., 219, their Lordships of the Privy Council following these decisions declared that a party could by his acts or words equitably estop himself from denying that he was not bound to pay under a decree, and that they were in nowise pressed by the decision of Justice Markby referred to above, and reported at 4 B. L. R., 113. Looking at these two decisions of the Privy Council, it may be considered as decided that parties are bound by any agreement that the questions between them shall be dealt with in a manner contrary to the ordinary practice of the Court, if the Court has jurisdiction over the subject, and does not assume the duty of another tribunal. And so where a judgment-debtor entered into an arrangement with his creditor to pay in instalments, and the parties acted on it, he was declared estopped from saying the creditor was bound to execute the original decree, or bring a suit on the kistbundi—*Denonath Sen* vs. *Gooroo Churn Pal*, 21 W. R., 310. And where an instalment bond was executed without objection in the Lower Courts, the High Court refused to entertain any such objection in special appeal—*Mussamut Khedo* vs. *Kalee Sahoo*, 12 W. R., 71. These decisions, however, do not touch the principle of the Full Bench decision, so far as it decides that parties cannot by consent override the law of limitation and extend the period fixed by law—*Heera Lall Mookerjee* vs. *Roy Dhunpat Sing*, 24 W. R., 283. On the same principle the decision in the case of *Aodh Beharee Lall* vs. *Brojo Mohun Lall*, 13 W. R., 128, that the joint nature of a decree cannot be altered by any subsequent agreement between the parties, can be hardly held to be good law, and it would seem as if the last paragraph in the section had been passed in ignorance of the state of the existing law. Where a judgment-debtor agreed, in order to avoid execution, to give a higher rate of interest than that allowed by the decree, held he was estopped from objecting that the Court on a subsequent execution could not go beyond the decree and award interest at the higher rate—*Sheo Golam Lall* vs. *Bani Prosad*, 4 C. L. R., 29. As to enforcing a compromise in a summary manner see *Scully* vs. *Lord Dundonald*, 8 Ch. Div., 658, 668; *Gilbert* vs. *Endean*, 9 Ch. Div., 267.

In execution of a decree for a sum of money a kistbundi was filed in which it was stipulated that the amount due should be paid in certain instalments, and on default that the whole amount should be recovered by execution of decree. Default was made; plaintiff sued for certain instalments more than 12 years afterwards, but within 12 years from the date on which they fell due. *Held*, that the suit was not barred and that the stipulation that on default all would fall due only referred to execution and not to a regular suit—*Juggut Mohinee Dossee* vs. *Monohur Koonwar*, 25 W. R., 278.

Cases, no doubt, will arise where, though the decree has not been altered, the parties have entered into a private kistbundi, and payments have been made under it. The rule in such cases seems to be that such payments are payments under the decree unless it is clear that it was the intention of the parties that the decree should be satisfied by the kistbundi—*Bishto Chunder Chuckerbutty* vs *Woomanath Roy Chowdhry*, 15 W. R., 459; *Bhoobunessuree Debia* vs. *Denonath Sandyal*, 11 W. R., 233.

A Court executing a decree cannot take notice of any compromise made outside the Court except by consent of the parties, and should execute the decree, leaving the aggrieved party to establish such rights as he may have under the compromise in a regular suit—*Jhundoo* vs. *Himmut*, 3 Agra, 81.

Evidence—In some cases petition containing the result of a compromise have been looked upon as not containing the agreement, but as only evidence of a previous oral contract. For a list of these cases see *Surju Prosad* vs. *Bhawani Sahai*, I. L. R., 2 Alla., 481.

In suits for land, Court may decree payment of mesne profits with interest.

211. When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mense profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose

favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit.

Explanation.—'Mense profits' of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom, together with interest on such profits.

This section applies to H. C.

A decree declaring plaintiff's right to a certain share in a business should direct an account to be taken. Otherwise nothing can be done in the execution department—*Ram Lapit Ram* vs. *Chooaram*, 4 C. L. R., 97.

This section only applies to suits of the nature described in the text: and a suit for mense profits, not being a suit "for land or other property yielding rent," cannot be brought under this section—*Chaku Modan Ieana* vs. *Dullabh Dwarka*, 9 Bom., 7. Where a decree is silent as regards mense profits subsequent to the filing of the suit, they cannot be given in execution—*Sheik Abdol Ali* vs. *Mussamut Asruffun*, 25 W. R., 215; *Sadasiva Pillai* vs. *Ramalinga Pillai*, 24 W. R., 193; L. R., 2 Ind. App., 219; *Bhobunessuree Chowdhrain* vs. *Manson*, 22 W. R., 160; (but see *Raesoonissa Begum* vs. *Saroda Soondures Chowdhrain*, 16 W. R., 25;) so that if the decree only gives mesne profits up to the institution of the suit, the plaintiff cannot get them for any subsequent period in execution—*Janokee Nath Mookerjee* vs. *Raj Kisto Singh*, 15 W. R., 292. A decree for possession and wasilat from the date of suit, without specifying the period for which the calculation should be made, means up to possession being delivered—*Fokaruddin Mahomed Ahsan* vs. *Official Trustee*, L. R., 8 Ind. App., 197; but see *Ram Manickya Dey* vs. *Juggannath*, I. L. R., 5 Cal., 563; *Bunsee Singh* vs. *Mirza Nuzuf Ali Beg*, 22 W. R., 328; *Skinner* vs. *Aldwell*, 2 Alla., 3. Where a decree can be interpreted without reference to any other document, and apparently falls within a certain section, but if interpreted with reference to another document might be considered as having been passed under another section, the first interpretation should be followed—*Toondun Singh* vs. *Pukh Narain Singh*, 13 W. R., 347; 5 B. L. R., 546.

The plaintiff is bound to put forward his whole claim for mesne profits. Thus where plaintiff who had sued for possession and mesne profits from the date of institution till she should get possession, and, obtaining a decree, subsequently sued for mesne profits before institution, the suit was dismissed—*Ram Ruttun Audo* vs. *Ram Chunder Pal*, 25 W. R., 113.

The determination of mesne profits under this section is an essential part of the decree, and as such must be made by the Court trying the case; it cannot be left to another Court, *e.g.*, the Court that will execute the decree—*Mussamut Bibee Meher Jan* vs. *Mussamut Bibee Gerda*, 25 W. R., 270; nor can the duty be deputed to an Ameen—*Indurjeet Singh* vs. *Radhey Singh*, 21 W. R., 269. It is in short a continuation of the suit between the parties, and is not affected by any period of limitation; but if either party, upon being duly summoned to appear and prosecute the proceedings, fails to do so, the Court should either dismiss them for default and not resume them again—*Mussamut Fuzeelun* vs. *Syed Keramut Hossein*, 21 W. R., 212, or decree them *ex-parte*—*Punchanun Bose* vs. *Oomanat Roy Chowdhry*, 14 W. R., 160. The defendant should not be called upon to answer until the plaintiff has started his case by giving *primâ facie* evidence of the damage he has sustained by loss of mesne profits; he must fix the liability of the defendant and the amount he is liable for—*Indurjeet Singh* vs. *Radhey Singh*, 21 W. R., 269. Once the liability of a party is fixed in the Appellate Court, the Lower Court must confine its enquiry to assessing the amount of damages—*Dwarka Lall Mundur* vs. *Nirunder Narain Singh*, 22 W. R., 461.

Mesne profits will in some cases not be allowed before the date of suit—*Thakur Shere Bahadur Singh* vs. *Thakuroain Dariao Kuar*, I. L. R., 3 Cal., 645; *Sri Raghunadha Anunga Bhema Deo* vs. *Brijokishore Palla Deo*, L. R. Ind., 3 App., 154; *Sarkies* vs. *Prosonomoyee Dossee*, I. L. R., 6 Cal., 794; *Juggunath Sahoo* vs. *Shah Mahomed Hossain*, 14 B. L. R., 386; or notice of claim—*Shumbhoo Chunder Surmah* vs. *Issur Chunder Lahory*, 2 Sev., 4.

Court may determine amount of mesne profits prior to suit, or may reserve inquiry

212. When the suit is for the recovery of possession of immoveable property and for mesne profits which have accrued on the property during a period prior to the institution of the suit, and the amount of such profits is disputed, the Court may either determine the amount by the decree itself, or may

pass a decree for the property and direct an inquiry into the amount of mesne profits, and dispose of the same on further orders.

This section applies to H. C.

Like the previous section, this section is only applicable to suits for mesne profits and immoveable property, and does not refer to ordinary suits for damages—*Ramtuhul Lal & Manohur Doss* vs. *Baboo Sheo Nath Singh*, 1 Alla., 22; *Bhenuck Singh* vs. *Tugger Singh*, 10 W. R., 299; and only to such mesne profits as have accrued before the institution of the suit and have not been expressly admitted—*Dhurm Narain Singh* vs. *Bhundoo Ram*, 12 W. R., 75.

A decree for a larger amount of wasilat than has been estimated for, or covered by the plaint, may be given in such cases; the amount demanded is merely an approximation—*Pearee Soonduree Dossee* vs. *Eshan Chunder Rose*, 16 W. R., 302; *Jadoomony Dabee* vs. *Hufez Mahomed Ali Khan*, I. L. R., 8 Cal., 295; *Fakharuddin* vs. *Official Trustee*, I. R., 8 Ind. App., 197; but the decree cannot be executed until stamp duty has been paid on the excess,—section 11, Act VII of 1870; *Luckhee Kant Doss* vs. *Deen Dyal Doss*, 14 W. R., 82. This interpretation of the Court Fees' Act was departed from in the case of *Gooroo Doss Roy* vs. *Bungshee Dhur Sen*, 18 W. R., 61, in which it was decided that section 11 only provides for those cases where a plaintiff has no means of knowing how long a suit would last, or what would be realized by the plaintiff while the suit was pending, and does not interfere with the ordinary rule that a plaintiff is not entitled to greater damages than he has claimed in his plaint; and see *Karoolal Thakoor* vs. *Forbes*, 7 W. R., 140. A plaintiff who sued for possession and mesne profits obtained a decree for possession, and nothing was declared as to profits; but no reason appearing why they should be refused, the High Court allowed them in execution—*Kaleenath Doss* vs. *Rajah Meah*, 22 W. R., 406; but see the case of *Sudasivia Pallai* vs. *Ram Langua Pillai*, referred to under section 186

Proceedings after the original decree for possession for the purpose of determining the amount of mesne profit are in effects proceedings in continuation of the suit and until those proceedings are brought to a close, and an assessment of mesne profits come to, it cannot be said that any decree for a specific sum of money exists for which application in execution can issue—*Deldar Hossein* vs. *Majadunissa*, I. L. R., 4 Cal., 629.

Mesne Profits how defined—The definition of mesne profits in section 211 follows the cases of *Dwarkanath Mitter* vs. *Ramdhone Biswas*, 8 W. R., 103; *Rugho Nath Dobey* vs. *Huttee Dobey*, 1 Agra, Mis., 17; but see *Jeykishen Mookerjee* vs. *Jodoonath Ghose*, 3 W. R., 21. Thus, a person not actually cultivating, but receiving rents, is accountable not only for the sums actually collected, but for what it might be reasonably supposed he could have collected—*Thakoor Doss Roy Chowdhry* vs. *Nobin Kisto Ghose*, 22 W. R., 127; *Baboo Lucky Narain Roy* vs. *Kally Puddo*, 4 C. L. R, 60, I. L. R., 4 Cal., 883, and the usual rule is to ascertain what would be a fair and reasonable rent for the land if the same had been let to a tenant during the period of the unlawful occupation of the wrong-doer—*Rugho Nath Dobey* vs. *Huttee Dobey*, 1 Agra, Mis., 17; and this indeed is the only rule on which to proceed where the person in wrongful possession has himself occupied and cultivated it—*Rani Asmut Kooer* vs. *Maharani Indrjeet Kooer*, F. B. R., 1003; *Gunga Prosad* vs. *Gojadhar Prosad*, I. L. R., 2 Alla., 651; especially if the cultivation is carried on at a great risk—*Soudaminee Dabee* vs. *Anundo Chunder Haldar*, 18 W. R., 37. But in other cases it will be held that the wrong-doer might, with ordinary diligence, have received the profits arising during the period from an occupation similar to that of the party wrongfully dispossessed—*Teluck Chand Baboo* vs. *Soudaminee Dossee*, 23 W. R., 108; *Mussamut Rookumee Kooer* vs. *Ram Tuhul Roy*, 17 W. R., 156, whether it be that of a cultivating ryot—*Nursingh Roy* vs. *John Anderson*, 19 W. R., 125; 16 W. R., 21; *Gooroo Dyal Mundur* vs. *Baboo Gopal Singh*, 24 W. R., 271; *Huruck Lall Saha*, vs. *Sreenibash Kurmokar*, 15 W. R., 428; *Promothonath Roy* vs. *Tripoora Soonduree Dabee*, 10 W. R., 463, standard or a zemindar—*Bhyrub Chunder Mojoomdar* vs. *Haro Prosunno Bhuttacharjee Chowdhry*, 17 W. R., 257 (but see *Madhub Chunder Dutt* vs. *Haradhun Paul Sootrodhur*, 14 W. R., 294); and to determine the amount it will be sufficient to shew the profits for the years preceding dispossession or afterwards—*Bhawaneedeen Sahoo* vs. *Mohun Sahoo*, 1 Alla., 273. Where the rents are taken as the test, then, unless the tenant's leases contain a contract to pay rent by defined instalments which, independently of any failure to pay on demand, might be made the subject of an action at a certain date within the year, the rents (*i.e.*, mesne profits) must be taken to fall due annually and at the end of the year—*Thakoor Doss Roy Chowdhry* vs. *Nobin Kristo Ghose*, 22 W. R., 126; *Thakoor Dass Acharjee* vs. *Shoshee Bhoosun Chatterjee*, 17 W. R., 208; *Byjnath Pershad* vs. *Badhoo Singh*, 10 W. R., 486; for the right to mesne profits accrues only from the date on which the plaintiff would have received them if he had not been dispossessed—*Luckhee Kant Doss* vs. *Deen Doyal Doss*, 14 W. R., 82.

As a matter of practice, the Courts in the North-West accept the papers filed by the patwaris under the zemindar's supervision as *primâ facie* evidence of the profits of the estate—*Rajah Deynarain Singh* vs. *Naik Pershad*, 2 Alla., 217.

Proof Necessary.—To establish a claim for wasilat, the plaintiff must shew that he was entitled to possession (for this a possessory decree is sufficient unless defendant shews a better title—*Radha Churn Ghuttuck* vs. *Zumuroonissa*, 11 W. R., 83), and that he was wrongfully kept out of possession by the defendant—*Dwarkaram Misser* vs. *Joyessur Lall*, 21 W. R., 276; but, the Court in execution cannot go beyond the decree or execution proceedings to ascertain the lands—*Gobinda Chunder Gooha* vs. *Bella D'Silva*, 1 Shome, 154. So all parties in wrongful possession, irrespective of how they got it, are liable—*Beebee Pearun* vs. *Ahmedali Khan*, 4 W. R., Mis., 7; *Suttya Nundo Ghosal* vs. *Suroop Chunder Doss*, 14 W. R., 76. Thus an auction-purchaser whose purchase is declared invalid—*Baboo Joy Narain* vs. *Sheik Forabun*, 4 Agra, 216, a mortgagor after the year of grace—*Suroop Chunder Roy* vs. *Mohendra Chunder Roy*, 22 W. R., 539, or a *bond fide* holder—*Mugun Chunder Chutterji* vs. *Surbessur Chuckerbutty*, 8 W. R., 479; *Byjnath Persad* vs. *Badhoo Singh*, 10 W. R., 486, or an izaradar with his zemindar—*Biddya Moyee Debia Chowdrain* vs. *Ram Lall Misser*, 17 W. R., 148, or an under-tenant is liable for mesne profits—*Ram Chunder Surmah* vs. *Ram Chunder Pal*, 23 W. R., 226 (ryots are exempt on the ground that they ought not to be harassed—*Woomesh Chunder Roy* vs. *Makhund Mookerjee*, 12 W. R., 35). Nor is it necessary that the defendants should be in possession; it is sufficient that they were active in keeping plaintiff out of it—*Ghooghly Sahoo* vs. *Chunder Pershad Misser*, 21 W. R., 246; thus a lessor preventing ryots from paying his lessee is liable—*Bheekumber Singh* vs. *Raj Chunder Ghose*, 15 W. R., 196 (see, however, *Shama Shunker Chowdhry* vs. *Sreenath Banerjee*, 12 W. R., 354); so a mortgagor who, after the mortgagee foreclosed and got a decree, neither gave up possession to the mortgagee, nor told his lessee to pay the latter rent, was cast in mesne profits—*Surrup Chunder Roy* vs. *Mohender Chunder Roy*, 22 W. R., 539.

It is, however, unnecessary to shew that the defendant has enjoyed the mesne profits instead of the plaintiff. It is enough to shew that he was active in keeping the plaintiff out of possession and enjoyment of the property. If he has done so, and has done so wrongfully, he is bound to pay to the plaintiff consequential damages, whether he derived any profit himself from the possession of the land or not—*Ghooghly Sahoo* vs. *Chundee Pershad Misser*, 21 W. R., 246.

Effect of a decree for Mesne Profits.—The decisions declaring the incidents of the liability imposed by a decree for wasilat are not uniform. In a suit for damages against several persons for keeping plaintiff out of possession, they are all equally liable to him, and no one can restrict his liability to that portion of the property in his possession—*Jhoonkee Paurey* vs. *Ajoodhya Doss*, 19 W. R., 2 8; and if they knew it was illegal to dispossess the plaintiff there would be no contribution—*Ruttee Sirdar* vs. *Sajoo Poramanick*, 11 B. L. R., 345; but if the plaintiff abstain from suing any one of them, probably the decree against the others would bar a new suit against him—*Brinsmead* vs. *Harrison*, L. R., 6 C. P., 448; 7 C. P., 547; *Roop Loll Mullick* vs *Rajendro Narain*, 1 C. L. R., 61. There are, however, several decisions, especially in the early reports, allowing contribution between the wrong-doers; and in one case it was held that, unless the plaintiff sued all the defendants under a decree for possession, his suit would be dismissed, because if he did not do so, the parties cast would have no remedy against the other wrong-doers, whereas this would not be the case if the decree bound them all, and only some of them paid—*Suttya Nundo Ghosal* vs. *Suroop Chunder Doss*, 14 W. R., 76; and in an action for damages the whole liability has been divided in proportion to the amount of profits that each has derived from the wrongful possession—*Fuzul Mahomed Mundul* vs. *Raj Coomaree Dabee*, 6 W. R., 113; and this rule has been followed, even though there was no such limitation in the decree—*Bulwunt Singh* vs. *Shea Sahoy Singh*, 2 W. R., Mis., 52, on the ground that a person's "liability to satisfy a joint and common decree would in equity extend no further than to the particular land" he was in possession of—*Gunesh Dutt* vs. *Bulwunt Singh*, 14 W. R., 175.

A decree for mesne profits against a person who claimed the lands as shebait of a Hindu idol, where the profits of the lands had gone into the idol's treasury, has been held not to be a decree against the person as an individual, but as shebait, and to be satisfied out of the idol's property—*Ranee Shibeshuree Dabia* vs. *Mothoornath Acharjee*, 5 W. R., 202. Mesne profits are only given for the period that the plaintiff has been kept out of possession. It has been held that it is an essential part of the decree that the time should be stated, otherwise the Court executing it has no power to assess the mesne profits—*Wise* vs. *Rajendur Coomar Roy*, 11 W. R., 200; but in another case in which the decree did not specify the amount or the period, it was held that everything was left to be settled in execution, and plaintiff was entitled to mesne profits within the period of limitation—*Hureehur Mookerjee* vs. *Mollah Abdoolbur*, 17 W. R., 209. The general rule is that mesne profits are demandable from the date they become annually due—*Maharaj Ker Rumaput Singh* vs. *Furlong*, 3 W. R., 38; and each sum gives a separate cause of action—*Ranee Surnomoyee* vs. *Unnonda Gobind Chowdhry*, W. R., 1864, p. 163. To this there are two exceptions: (1) a purchaser for valuable consideration without notice of plaintiff's title is not liable for mesne profits from any date earlier than the institution of the suit, if the plaintiff has been guilty of laches—*Juggurnath Sahoo* vs. *Syud Shah Mahomed Hossein*, 14 Ben., 386; though slight delay in bringing the suit will of itself be insufficient to remove the liability—*Kaleenath Doss* vs. *Rajah Meah*, 22 W. R., 406; and (2) when a person has been dispossessed under a judgment, which is subsequently reversed, he can sue

from the date of reversal for mesne profits on account of the whole period—*Joykurun Lall* vs. *Ranee Asmudh Kooer*, 5 W. R., 125; *Mashrook Ali Khan* vs. *Jowala Bukh*, 2 Alla., 290, either in a new suit or in summary process in execution—*Durga Purshad Roy Chowdhry* vs. *Tara Purshad Roy Chowdhry*, 3 W. R., P. C., 11; he is not bound to bring a regular suit—*Ununt Ram Hazrah* vs. *Kuralee Pershad Mistree*, 23 W. R., 441; he must proceed in execution only and no regular suit will lie—*Chowdhry Sibnarain Pohraj Mandhata* vs. *Chowdry Kishen Narain Pohraj Mandhata*, 10 W. R., 131; *Nagindro Dev Chund* vs. *Natha Petambar*, 10 Bom., 297; *Dubjeet Gorain* vs. *Rewah Gorain*, 22 W. R., 435; *Bebee Hamedin* vs. *Bebee Bhudhun*, 20 W. R., 238, and this seems the better opinion—(sections 244, 583). It has been held that whatever view is right it does not prevent a party from suing for the value of crops carried away by his opponent which he was entitled to under the decree—*Shurnomoyee* vs. *Pattari Sirkar*, I. L. R., 4 Cal., 625. A person making restitution must restore everything he is not entitled to, and cannot set up another person's title—*Prosunno Coomar Ghose* vs. *Mathoora Mohun Ghose*, 17 W. R., 232.

Mesne Profits, how calculated.—In calculating wasilat, the party in possession is generally called on to produce his accounts, and they are compared by an ameen with the pottahs and dakhilas in the ryot's possession; settlement papers 60 years old are useless as a basis to work on—*Paran Chunder Roy* vs. *Juggessur Mookerjee*, 17 W. R., 298; deductions, usually 10 per cent., are made for collection expenses—*Boodh Sein* vs. *Jog Raj*, S. D., N. W., 1861, p. 634; *Dabee Dass* vs. *Mussamut Mana*, id., 1864, p. 303; *Gooroo Doss Roy* vs. *Anund Moyee Dabia*, 15 W. R., 203; but see *Attafali* vs. *Lalji Mal*, I. L. R., 1 Alla., 518, and also for Government revenue, losses by desertion and death of ryots, drought, &c.—*Doonoboundhoo Nundee* vs. *Kashub Chunder Ghose*, 3 W. R., Mis., 25; and if the decree is against a person as shebait, the necessary expenses of the idol must be allowed—*Thakoor Doss Acharjee Chuckerbarty* vs. *Shoshee Bhoosun Chaterjee*, 17 W. R., 208; but charges for management are not allowed unless the party accounting has *bonâ fide* believed himself to be in rightful possession—*Mussamut Azeemoonissa* vs. *Chowdhree Sufder Ali*, S. D., N. W., 1862, p. 246. Lands of such a nature as would under ordinary circumstances, yield no profit, should not be taken into account unless it has been shewn that the judgment-debtor could have gained a profit from them—*Becharam Doss* vs. *Brojonath Pal Chowdhry*, 9 W. R., 369.

Where A, the donee of a piece of land bestowed on him rent-free, sued the purchaser of his donor's title to the land for possession and mesne profits, it was held that the purchaser could not make any deduction on account of Government revenue—*Maharajah Isree Pershad* vs. *Nazma Beebee*, S. D., N. W., 1861, p. 708.

Where there are cross-demands for wasilat under the same decree, the entire profits should be calculated and divided rateably, and then there should be a set-off to the extent of the profits actually received by each sharer, and the deficit in each year, on any share made up by the party who received the excess—*Bijoy Gobind Naik* vs. *Kalee Prosunno Naik*, 16 W. R., 294.

A got a decree for possession and wasilat of an estate consisting of villages, and in execution it was found that five of these villages were in one district and two in another, and the Court, unable to apportion the Government revenue, determined the wasilat for the two villages outside its jurisdiction, as well as for the five within it. It was held that the Court was wrong in determining the wasilat of the two villages, but a deduction of the whole Government revenue was allowed, with a declaration that when execution would be taken out in the proper Court for the two villages no deduction should be made for Government revenue—*Puran Chunder Roy* vs. *Juggesur Mookerjee*, 17 W. R., 298.

Interest is allowed on wasilat in Bombay where the case falls under section 211, but not otherwise—*Chaku Modan Isana* vs. *Dullabh Dwarka*, 9 Bom., 7; *Gundo Anandrav* vs. *Krishnarav Gobind*, 4 Bom., 55. In the former case the Court expressed a doubt whether interest could be given on wasilat from the date of possession to the date of payment; though in the Privy Council case of *Kirkland* vs. *Modee Pestonjee Khoorsejee*, 3 Moore, 220, it was held that a sum found due for mesne profits was looked on in Bombay as a judgment-debt, and carried interest by its own force, and their Lordships declared that such a practice was neither unreasonable nor unlawful. This case was not referred to in the Bombay judgment. It is, however, followed in Bengal, where interest is allowed on mesne profits from the date of assessment, but not on the separate sums for the several years on account of which they are due—*Ajoodhya Persad* vs. *Jowahir Lall*, 22 W. R., 484; unless the profits are of such a nature, *e., g.*, of a coal pit, that they could not be ascertained at the time of the institution or indeed before the decree—*Bengal Coal Company* vs. *Mussamut Darembah Dabea*, Marsh., 105; *Mobaruk Ali* vs. *Boistub Churn Chowdhry*, 11 W. R., 25. But there is no rule of law debarring a plaintiff from recovering interest—*Sokhee Monee Debia* vs. *Brijoraj Mookerjee*, 17 W. R., 228; and where a purchaser was kept, for upwards of 20 years out of the annual payment of a toda garashuk (a hereditary tenure in Bombay), their Lordships of

the Privy Council decreed simple interest on each annual payment from when it became due—*Sumbhoolall Girdhurlall* vs. *Collector of Surat*, 8 Moore, 1. This rule has been followed in Bengal—*Protap Chunder Borooah* vs. *Rani Sornomoy*, 14 W. R., 151, *Huro Doorga Chowdhrany* vs. *Shurrut Soondery Dabia*, 3 C. L. R., 517, and approved of in the later decisions, on the ground that the plaintiff should be compensated for his actual loss, *i. e.*, mesne profits *plus* interest on each annual amount—*Mussamut Bibee Budlum*, vs. *Syud Fusloor Rohman*, 23 W. R., 449. No difference should be made as regards interest between wasliat paid in kind and paid in money—*Sreemutty Rayee Kishoree Dossee* vs. *Bonomally Churn Mytee*, 10 W. R., 209, and the general rule in Bengal is that interest may be awarded as a matter of course from the date of suit on a decree, but if awarded from an earlier or late date special reasons should be given—*Hurro Persaud Roy* vs. *Shampersad Roy*, I. L. R., 3 Cal., 654, and see 4 C. L. R., 60. Interest cannot be given in execution if the decree is silent—*Huro Doorga Chowdrani* vs. *Surat Soondari Debi*, L. R., 9 Ind. App., 1.

A decree for interest on mesne profits from the date they are ascertained, means the date they are ascertained by the Court and not by the ameen—*Doorga Sundooree Debia* vs. *Sibessuree Debia*, 10 W. R., 391.

Administration-suit.

213. When the suit is for an account of any property and for its due administration under the decree of the Court, the Court, before making the decree, shall order such accounts and inquiries to be taken and made, and give such other directions, as it thinks fit.

In the administration by the Court of the property of any person who dies after this Code comes into force, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being with respect to the estates of persons adjudged insolvent;

and all persons who in any such case would be entitled to be paid out of such property may come in under the decree for its administration, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

Applications under section 265 of the Indian Contract Act, 1872, shall be deemed to be suits within the meaning of this section.

This section applies to H. C.

The second paragraph of this section was passed in England to assimilate the practice in Chancery to that in Bankruptcy. In Chancery a secured creditor could, in an administration suit, prove for the full amount of his debt; in Bankruptcy he must realize his security and prove for the balance. This is now the law—In re *Coal Consumers' Association*, 4 Ch. D., 625; *Kellock's Case*, L. R., 3 Ch., 769. A creditor may sue for the administration of the estate of his deceased debtor, but must bring the suit on behalf of himself and the other creditors—*Worraker* vs. *Pryer*, 2 Ch. D., 109. See as to parties—*Dowdeswell* vs. *Dowdeswell*, 9 Ch. Div., 294; as to costs, *in re Jones*, 10 Ch. Div., 40; executor's expenses—*Sharp* vs. *Lush*, 10 Ch. Div., 468; as to subsequent action after administration judgment—*Laming* vs. *Gee*, 10 Ch. Div., 715; as to right of relatives—*Richmond* vs. *White*, 10 Ch. Div., 727.

Section 265 of the Contract Act runs as follows :—

"In the absence of any contract to the contrary, after the termination of a partnership, each partner or his representative may apply to the Court to wind up the business of the firm to provide for the payment of its debts, and distribute the surplus according to the shares of the partners respectively.

"*Explanation*—The Court in this section means a Court, not inferior to the Court of a District Judge, within the local limits of whose jurisdiction the place or principal place of business of the firm is situated."

On such an application the following would probably be the form of the order :

Let the following accounts be taken :

(1.) An account of the partnership dealings and transactions between the plaintiff and the defendant.

(2.) An account of the credits, property and effects of the partnership at the dissolution.

(3.) An account of the partnership debts and liabilities at the same time.

(4.) An enquiry what has since become of the partnership property, and whether any and if any what parts thereof remain in specie or outstanding and undisposed of.

(5.) Let such of the partnership property and effects as shall remain in specie be sold with the approbation of the Judge, and the money to arise by such sale paid into Court to the credit, &c. Adjourn further consideration—*Hirtzel* vs. *Mules*, Pemberton, 169.

For the stamp on such an application see *Ladhubhai Premchand* vs. *Reirchand Venichand*, I. L. R., 6 Bom., 143.

Suit to enforce right of pre-emption.

214. When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid, the suit shall stand dismissed with costs.

This section is new. It applies to H. C.

It is the practice of the Courts to allow claims to pre-emption to be asserted on the grounds both of contract and custom in one and the same suit—*Nehchal* vs. *Than Singh*, 2 Alla., 222.

Where a party, through an execution proceeding, obtains possession of land which is bound by right of pre-emption, he ought to have the benefit of the purchase-money which the pre-emptor is to pay—*Buksha Ali* vs. *Tofer Ali*, 20 W. R., 216; and if the right is based on contract, it does not arise where the sale is not by the contracting party, but by a third person under a decree—*Shaikh Ferasut Ali* vs. *Ashootosh Roy Singh*, 15 W. R., 455.

A person obtained a decree declaring him to be entitled to certain lands by pre-emption and ordering payment of the purchase-money within one month. He paid the money into Court, at the same time petitioning that it should be held by the Court and not made over to the defendant until mutation of names in the Government Registry had taken place. This prayer was allowed. Subsequently defendant refused to accept the moneys deposited on the ground that the payment was clogged with a condition. It was held that, though the petition asked that the money might be held in deposit until mutation of names had been made, still it could not be said that the payment was saddled with a condition precluding payment before mutation, and that the objection could not prevail—*Ajhoodhia Shookol* vs. *Jewbhood Shookol*, 6 Alla., 46.

The Appellate Court can extend the time allowed to deposit the price—*Parshadi Lall* vs. *Ram Dial*, I. L. R., 2 Alla., 744; but where the decree-holder failed to deposit the money within the time prescribed a subsequent application with a tender of the money was refused—*Shah Ahmed Ali*, petitioner, S. D. Sum. Decis., December 26, 1840.

A and others hold land at a fixed rent; the mahkaun of which was paid to other parties as proprietors: A sold some land to B; C claimed by pre-emption obtained a decree and paid the money which was handed over to B. In the meantime, the land was resumed and a settlement made with the proprietors; thus ousting the several parties to the pre-emption transaction. *Held*, C could not recover the purchase-money from B—*Sheik Soopun*, petitioner, S. D., Sum. Decis., May 4, 1841.

One coparcener has no right of pre-emption against another—*Lalla Nowbut Lal* vs. *Lalla Jewan Lall*, I. L. R., 4 Cal., 831.

Suit for dissolution of partnership.

215. When the suit is for the dissolution of a partnership, the Court, before making its decree, may pass an order fixing the day on which the partnership shall stand dissolved, and directing such accounts to be taken and other acts to be done as it thinks fit.

This section applies to H. C.

The usual form of such a decree is:—

"Declare that the partnership between the plaintiff and defendant in the pleadings ought to be dissolved as from the——day of——and decree the same accordingly.

"Let the following accounts be taken:—

"(1.) An account of all partnership dealings and transactions between the plaintiff and defendant from the——day of——

"(2.) An account of the credits, property and effects now belonging to the said partnership. Any settled account not to be disturbed. Further consideration adjourned." Pemberton, 167.

Suit for account between principal and agent.

215A. When a suit is for an account of pecuniary transactions between a principal and agent, and in all other suits not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before making its decree, pass an order directing such accounts to be taken as it thinks fit.

Decree when set-off is allowed.

216. If the defendant has set-off the amount of a debt against the claim of the plaintiff, and such set-off has been allowed, the decree shall state what amount is due to the plaintiff and what amount (if any) is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Effect of decree as to sum awarded to defendant.

The decree of the Court, with respect to any sum awarded to the defendant, shall have the same effect, and be subject to the same rules in respect of appeal or otherwise, as if such sum had been claimed by the defendant in a separate suit against the plaintiff.

This section applies to H. C. and M. S. C. C.

This section applies only to cases in which the defendant has been allowed a "set-off," and not to cases where, in ascertaining a defendant's liability for mesne profits, deductions are allowed for costs of cultivation or collection expenses—*Tiluck Chand Baboo* vs. *Soudaminee Dossee*, 25 W. R., 275.

217. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

Certified copies of judgment and decree to be furnished.

This section applies to H. C. and M. S. C. C.

The parties are entitled to receive copies of the judgment, and not merely translations of them—*Varjivan Rangji* vs *Aji Daji*, 1 Bom., 165.

The practice of furnishing copies free of cost, on supplying the proper stamp, has been set aside. See the case of *Rajah Nil Monee Singh Deo* vs. *Chinibas Mahanti*, 20 W. R., 405.

CHAPTER XVIII.

OF COSTS.

218. When disposing of any application under this Code, the Court may give to either party the costs of such application, or may reserve the consideration of such costs for any future stage of the proceedings.

Costs of applications.

This section applies to H. C.

An order in regard to trustee's costs, charges and expenses not being costs of suit is not an order under this section—*In re Chennel*, 8 Ch. Div., 492. See also *ex-parte* Wainright, 19 Ch. Div., 140.

Defendant cannot sue plaintiff for costs incurred in successfully resisting a claim. It is only when the costs are made part of the order that a party can enforce their payment, and then only in execution—*Referred Case*, 3 Mad., 341.

Where an action is brought on contract in the High Court, and the amount decreed is within the jurisdiction of the Small Cause Court, the plaintiff cannot get costs unless the Judge trying the case certifies that it was fit to be brought in the High Court—*Sabapati Mudaliyar* vs. *Narayansvami Mudalayar*, 1 Mad., 115; but it is otherwise if the suit is for interest and principal due on a mortgage, for in such a case the Small Cause Court has no jurisdiction—*Mirtunjoy Dutt* vs. *Cameenee Dossee*, 1 Ind. Jur., N. S., 95. On this point, see also *Chunder Cant Mookerjee* vs. *Judoonath Khan*, 1 C. L. R., 470.

Appeal.—An appeal for costs only lies in regard to appealable orders. If the order is appealable, as affecting the jurisdiction of the Court or the merits of a case, an appeal will lie from that part of the order which relates to costs—*Balkissan Dass* vs. *Luchmeeput Singh*, I. L. R., 8 Cal., 91.

219. The judgment shall direct by whom the costs of each party are to be paid, whether by himself or by any other party to the suit, and whether in whole or in what part or proportion.

Judgment to direct by whom costs to be paid.

This section applies to H. C.

A Court is bound to decide by which of the parties costs shall be borne; it cannot declare that they shall be borne by the unsuccessful party in a suit to be subsequently instituted—*Kashee Chunder Dey* vs *Bungshee Buddun Dey*, 23 W. R., 89. Only parties can be made liable under the Code—*Jointee Chunder Sein* vs. *Anund Lall Doss*, 14 W. R., O. A., 1; but this is the only limitation, and though a defendant should not ordinarily be held liable for his co-defendant's costs, yet if he has colluded with the plaintiff and induced him to bring the suit, he may not only be made to pay his co-defendant's cost, but refused his own—*Bhyroo Raoot* vs. *Baboo*

Anooroodeb Deo Narain Singh, Marsh., 608; *Ram Chunder Mitter* vs. *Kisto Kamines Dassee*, 10 W. R., 194. In a suit brought against several parties some admitted the debt and partnerships; but others denied them. *Held*, the defendants who disputed the claim should pay the costs of those who admitted it—*Juggut Chunder Roy* vs. *Roop Chund Shaw*, I. L. R., 6 Cal., 811.

An estate, and not the manager thereof, is liable for the costs of a suit instituted in perfect good faith for the benefit of the property—*Ram Kishore Acharjee Chowdhry* vs. *Luckhee Dabia Chowdhrain*, 1. W. R., Mis., 1; but where the widow of a deceased proprietor applied for a certificate under Act XL of 1858, and asserted she was in possession of all his property, and mentioned as among her property a certain pergunnah, it was held that she must pay the costs of a party who could object her taking out a certificate for that pergunnah, although she had not asked for a certificate for it—*Feda Hossein* vs. *Ranee Khajoorunnissa*, 9 W. R., 459. A suit for contribution will lie where one has paid more than his share of costs on a joint decree—*Kisto Coomar Chowdhry* vs. *Anund Moyee Chowdhrain*, 7 W. R., 300.

As to the person who should bear the costs in suits for judicial separation and divorce cases—see *Fowle* vs. *Fowle*, I. L. R., 4 Cal., 260; *Proby* vs. *Proby*, I. L. R., 5 Cal., 357.

Power of Court as to costs

220. The Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit, and the fact that the Court has no jurisdiction to try the case is no bar to the exercise of such power:

Provided that, if the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing.

Every order relating to costs made under this Code and not forming part of a decree may be executed as if it were a decree for money.

This section applies to H. C. and M. S. C. C.

The judgment must direct by whom and in what proportion the costs should be paid. Any omission to do so may be rectified by review—*Ram Sahoy Singh* vs. *Rookhoo Singh*, 15 W. R., 414, provided the applicant has not delayed too long, say 3½ years—*Oodoy Tara Chowdrain* vs. *Syud Jonab Ali Chowdhry*, 17 W. R., 358, or the judgment has not been appealed against and a final decree passed by the superior Court—*Bilao Singh* vs. *Salig Ram Singh*, S D., N. W., 1861, p. 460. In Bengal and Bombay the appeal must also be a regular appeal, since no special appeal will lie unless the order made is illegal—*Gridhari Lall Roy* vs. *Sundar Bibi*, B. L. R., Sup. Vol., 496; 6 W. R., 187; *Futeek Parooee* vs. *Mohendranath Mozoomdar*, I. L. R., 1 Cal., 385; *Assa Ram* vs. *Kashmeeree Dass*, 1 Agra, 90, (overruling *Mussamut Bibee Mosechun* vs. *Mussamut Bibee Munooram*, 24 W. R., 69; *Ooma Churn* vs. *Grish Chunder Banerjee*, 25 W. R., 22; *Amer Saheb Hafizulla* vs. *Jamshedji Rustamji*, 4 Bom., 41; *Desaji Lukhmaji* vs. *Bhavanidas Narotamdas*, 8 Bom., 100; *Chethrayil* vs. *Irumanom*, 3 Mad., 279); but it is otherwise in Madras—*Sri Dantuluri Narayana Gajapathi Raznoaru* vs. *Saruppa Raza*, 3 Mad., 113, and see *Mussamut Keemee Baee* vs. *Luchmun Dass Narain Dass*, 5 W. R., P. C., 59. No objection as to the amount of costs allowed in the suit can be raised in execution of decree—*Hurinath Banerjee* vs. *Doybo Chunder Banerjee*, 5 W. R., Mis., 4. Interest on costs cannot be allowed in execution unless it is inserted in the decree—*Forester* vs. *Secretary of State*, I. L. R., 3 Cal., 161.

General Rule—The general rule is that, if a plaintiff recovers a less amount than he claimed in his plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed—*Mudhun Mohun Doss* vs. *Gokul Doss*, 10 Moore, 563; that is to say, that costs follow the result of the case, unless there are equitable reasons to the contrary—*Nusar Ali* vs. *Mussamut Nuseeboonnissa*, S. D., N. W., 1847, p. 313; *Sri Dantuluri Narayana Gajapathi Razugaru* vs. *Surappa Raza*, 3 Mad., 113; thus a person wrongly made a party—*Benee* vs. *Bunwaree Lall*, S. D., N. W., 1853, p. 698; *Lukeemu Beebee* vs. *Usudulli*, id., 1861, p. 333, or respondent, should get his costs—*Sheo Pershad* vs. *Lalljee*, id., 1863, p. 1; and so should a

party who has not opposed plaintiff's claim—*Government* vs. *Mussamut Sanoola*, 3 W. R., 23, or disclaims—*Shunt Bhuksh* vs. *Lulla Nund Ram*, 11 W. R., 481 or has no interest in the suit, and has unnecessarily been made a party—*Collector of Dacca* vs. *Kumala Kant Mookerjee*, 2 W. R., 38, and would *have suffered some injury if he had not appeared*—*Collector of the 24-Pergunnahs* vs. *Wilkinson*, 12 W. R., 444. And in general whether a party be made pay costs or not is to depend on the facts of the case or the conduct of the parties in the litigation; not on the mode in which counsel argue it, or because counsel may claim more than he is entitled to—*Moet* vs. *Rickering*, 8 Ch. Div., 372; but a party will not get costs if he has induced plaintiff to sue him—*Lalla Bhugwan Doss* vs. *Syed Akbar*, 1 Ind. Jur., N. S., 390, or does not raise the defence on which he succeeds till special appeal, for in such cases no costs should be granted—*Nobeen Kishen Mookerjee* vs *Shib Pershad Pattack*, 7 W. R., 490.

Rule of Proportion.—On the same principle, where the plaintiff has failed in part, and succeeded in part, the costs are apportioned so as to give to each party the costs applicable to the matter upon which he has succeeded—*Turachand Mookerjee* vs. *Jadoo Nath Mookerjee*, Marsh., 79; *Bamasoondery Debea* vs. *Rogers*, 7 W. R., 127; *Bunsee* vs. *Bukshee Ram*, S. D., N. W., 1862, p. 334; and this is what is meant by awarding plaintiff costs in proportion—*Bykunt Nath Chowdhry* vs. *Mohessuree*, 4 W. R., Mis., 9. Thus where the plaintiff obtains only 40 rupees out of 134 rupees claimed—*Toolsee Ram* vs. *Rooder Pershad*, S. D., N. W., 1861, p. 346, or even only one-fourth of his demand the costs should follow the amount decreed—*Mussamut Choona Beebee* vs. *Rahman Khan*, id., 559; but where the proportion gained or lost is very nearly equal to the whole demand, costs may be wholly allowed or wholly disallowed—*Sheo Dyal Tewaree* vs. *Bishonath Tewaree*, 9 W. R., 61; *Heera Ram Bhuttacharjee* vs. *Ashruf Ali*, 9 W. R., 103. Thus where the suit is to redeem and for mesne profits, and the right to redeem is declared, though only a small portion of the mesne profits is granted, full costs should be allowed—*Holas Rai* vs. *Sumbhoo Nath*, S. D., N. W., 1862, p. 68; and where a party has acted with malice and malevolence—*Kalee Pershad Shaha* vs. *Ram Pershad Shaha*, 18 W. R., 14, as distinguished from mere hardness in exercising a civil right—*Muddun* vs. *Allopudeen*, S. D., N. W., 1861, p. 569, or the defence is false and unscrupulous, costs will not be allowed—*Ram Gopal Chatterjee* vs. *Bhoobun Mohun Banerjee*, Coryton, 126. And in a suit where plaintiff, after prolonged and harassing litigation, only obtained nominal damages, it was declared that the rule of proportion should not be followed—*Mussamut Bibee Moseehun* vs. *Mussamut Bibee Munoorun*, 24 W. R., 69. Where the plea of non-jurisdiction is first taken in special appeal, each party has been directed to pay his own costs—*Nobeen Kishen Mookerjee* vs. *Shib Pershad Pattack*, 7 W. R., 490. In certain cases no costs are allowed. Plaintiff gets no costs where the defendant does not possess sufficient moveable property to satisfy a Small Cause Court decree, and plaintiff failing to execute in full, sues in the High Court—*Mohendra Nath Ash* vs. *Beedebodun Dutt*, 1 Ind. Jur., N. S., 220; nor did a defendant, when plaintiff withdrew his suit, without sanction, before judgment—*Brass* vs. *Tiruven Gada Pillai*, 1 Mad., 247, but now, see section 373.

On the original side of the High Court when defendant pays in, and plaintiff draws money out of Court, the latter is entitled to costs incurred before the money was paid in—*Ardesir Limji* vs. *Sorabji Pestonji*, 1 Bom., 70.

See as to costs of appearing in chambers in an administration suit—*Sharp* vs. *Lush*, 10 Ch. Div., 468.

Separate Costs.—Where the interests of the parties are separate and distinct, separate costs should be allowed to each—*Kossella Koer* vs. *Beharee Pattuck*, 12 W. R., 70. Thus, where one defendant pleaded that he had nothing to do with the property sued for and proved it, conducting his defence by a separate pleader, he was allowed his costs—*Ram Chunder Gossain* vs. *Mutty Lall Bagchee*, 11 W. R., 19; and if the defendants are zemindar and patnidar, and the suit is for possession of land—*Gobind Nath Roy Bahadoor* vs. *Ranee Luchmee Koomaree*, 11 W. R., 36, or the defendants have been charged with misappropriating property—*Nilkanth Surmah* vs. *Soosela Debia*, 6 W. R., 324, or in any case if they represent different interests and live so far from each other that it could not be reasonably expected that they would employ the same pleader, separate costs should be allowed—*Choonee Lall* vs. *Gopaul Chunder*, S. D., N. W., 1859, p. 1. But where the defence is common to all—*Francisco De Assis* vs. *Dos Anjos*, 17 W. R., 188, or their interests are the same, as if they are joint holders—*Brindabun Chunder Chowdry* vs. *Ram Coomar Chowdry*, 1 W. R., 139, or if they are representatives of a mortgagee—*Shah Mukhun Lall* vs. *Baboo Sree Kishen Singh*, 12 Moore, 157, or if they are members of the same family, living in the same place, give the same answer, and the suit is for damages on account of their joint act—*Kassee Nath Roy Chowdhry* vs. *Hullodhur Roy*, 2 W. R., 60, or they are co-sharers suing separately on a joint cause of action, and the actions were from the first tried together—*Pearee Mohun Singh* vs. *Mirza Gazee Mojoomdar*, 11 W. R., 270; or, apparently, if from any cause defendants file separate defences unnecessarily, only one set of costs should be awarded—*Juggu Lall* vs. *Biharee Lall*, S. D., N. W., 1859, p. 349.

In Appeal.—When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree—*Shaikh Mahomed Busseeroollah* vs. *Ram Kant Chowdhry*, 16 W. R., 266, and a decree for "usual costs and

interest" means all costs which the successful party has incurred from the commencement of the suit until the date of the final decree with interest at (now) 6 per cent. from the date of decree—*Broughton* vs. *Rajah Sahib Pershad Sein*; and "The respondent should pay to the appellants the costs incurred by them in the lower Court" in a decretal order mean the costs specified in the decree appealed against as the costs incurred by the appellants—*Ram Chunder Sen* vs. *Koomar Durga Nath Roy*, 1 Shome, 143. Where a decree under which costs have been recovered is set aside in appeal, an express order is needed for a refund of the costs with interest—*Kedar Nath Pakrasee* vs. *Doya Moyee Debia*, 20 W. R., 49, and interest should be allowed—*Wooma Soonduree Burmonia* vs *Gooro Pershad Roy*, 15 W. R., 74, *Dorab Ally Khan* vs. *Abdool Azeez*, I. L. R., 4 Cal., 229—but these decisions are contrary to the decisions of the Privy Council—*Rodger* vs. *Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465; *Forester* vs. *Secretary of State*, 4 Ind. App., 137.

Though costs are in the discretion of the Court the rule of the Privy Council is that a successful appellant is as a rule entitled to his costs—*In re Wilson*, 1 Ch. Div., 113; *Monohur Doss* vs. *Romanath Law*, I. L. R., 3 Cal., 473. An order for costs made in the High Court on appeal is barred after three years—*Hurbuns Lall* vs. *Sheo Narain Singh*, 21 W. R., 391.

Where the appellants contended for in their petition of appeal for much more than they were entitled to, the House of Lords refused costs—*Elliot* vs. *Rokeby*, 7 App. Cas., 43, and see *The Agra* vs. *Elizabeth Jenkins*, L. R., 1 P. C., 501; *Rajrup Koer* vs. *Abdul Hosein*, I. L. R., 6 Cal., 394. And where on appeal the decision appealed from was upheld on different grounds from those relied on by the lower Court, the appeal was dismissed without costs—*Fischer* vs. *Kamala Naicker*, 8 Moore, 170. See also *Murtunjoy Chuckerbutty* vs. *Cockrane*, 10 Moore, 229.

As to costs in cases of set-off under section 111 *ante*, see *Stroke* vs. *Taylor*, 5 Q. B. Div., 586, *Baines* vs. *Bromley*, 6 Q. B. Div., 693; *Brijnath Dass* vs. *Juggernath Dass*, I. L. R., 4 Cal., 742.

Costs allowed.—Among the items that have been allowed are, the salary of one accountant, or even two, in cases in which the Court would appoint a commissioner to examine accounts—*Macnair* vs. *Hogg*, 2 Hyde, 89, expenses and losses arising from the attachment of the defendant's property when the suit is dismissed—*Sewa Ram* vs. *Landy*, S. D., N. W., 1856, p. 514; and where a case was remanded from the High Court with orders allowing plaintiff to amend on payment of all costs of the two first hearings, it was held that this order included the stamp for the plaint—*Madhub Chunder Bera* vs. *Ram Lochun Bera*, 14 W. R., 143.

A under a decree took possession of B's estate and carried on litigation commenced by B's agent, but lost and was cast in costs. Subsequently, B got his property in appeal. It was held, that A could not hold B liable for the costs—*Horo Moyee* vs. *Ram Kishore Acharjee*, 6 W. R., Mis., 124.

Pleader's fees must be calculated according to the rules, irrespective of any private arrangement between pleader and client—*Umritonath Jha* vs. *Roghoonath Pershad Roy*, 6 W. R., Mis., 35; the amount is calculated on what the plaintiff claims from the defendant—*Kasheenath Sein* vs. *Chunder Monee Dabee*, 9 W. R., 289, and when a suit contains several distinct claims against separate defendants, the amount of costs to be allowed to each depends on the claims against him—*Rajah Rooddur Narain Roy* vs. *Coomar Narain Patnaik*, 13 W. R., 320; but the rules do not provide for the case of persons having separate interests made defendants in order to perfect to their title and consent to a decree, and the Court should only allow them a sum sufficient to cover the costs of their appearance—*Ramputty Kooer* vs *Kalee Churn Singh*, 14 W. R., 94. Where there is no rule as to costs and no express agreement, a pleader is only entitled to reasonable remuneration for his work and labour—*Mussamut Ameeroonissa* vs. *Chapman*, 6 W. R., 108.

Plaintiff should not be saddled with the costs of three pleaders if two are sufficient—*Suksena Bibee* vs. *Usud Ali*, S. D., N. W., 1861, p. 333.

Follow the Event.—This means follow the result of the decision—*Garnet* vs. *Bradley*, 3 App. Cas., 944.

Costs may be set-off against sum admitted or found to be due.

221. The Court may direct that the costs payable to one party by another shall be set-off against a sum which is admitted or is found in the suit to be due from the former to the latter.

This section applies to H. C. and M. S. C. C.

If in consequence of any defect in the judgment or negligence on the part of the appellant in not getting the decree properly drawn up, costs have not been allowed, no set-off can be claimed in execution—*Huro Pershad Roy Chowdhry* vs. *Frolkishoree Dossee*, 16 W. R., 308.

The last clause would seem to suppose that a pleader has a lien on the amount decreed for his costs. There is no such law in the Mofussil Courts of India. See sections 171, 217, 221, Act IX, 1872.

See note on section 111, *ante*.

Interest on costs. Payment of costs out of subject-matter.

222. The Court may give interest on costs at any rate not exceeding six per cent. per annum, and may direct that costs, with or without interest, be paid out of, or charged upon, the subject-matter of the suit.

This section applies to H. C. and M. S. C. C.

The same rule applies to interest on costs as to interest on mesne profits, and it cannot be given in execution unless expressly granted by the decree—*Rajah Leelanund Singh* vs. *Rajah Ram Narain Singh*, 15 W. R., 415; *Shaikh Abdool Ali* vs. *Mussamut Asruffun*, 25 W. R., 215; *Sadasiva Pillai* vs. *Ramalinga Pillai*, 24 W. R., 193; 15 B. L. R., 383; even if the decree be a decree of the Privy Council—*Bhoza Rughbur Singh* vs. *Bhoza Roy Singh*, 8 Alla., 319; *Forester* vs. *Secretary of State*, L. R., 4 Ind. App., 137. Interest on costs after decree may be the subject of a separate suit—*Pillai* vs. *Pillai*, L. R., 2 Ind. App., 219; but if it is allowed by way of compromise on execution the Appellate Court will not interfere—*Sett Gopal Doss* vs. *Murli*, I. L. R., 3 Cal., 602; see also *Forester* vs. *Secretary of State*, L. R., 4 Ind. App., 137.

Trustees, executors, and administrators are entitled to their costs out of or charged upon the estate except in cases of vexatious conduct, or where, by their neglect or misconduct, they have occasioned the institution of the suit—*Simpson* vs. *Bathurst*, L. R., 5 Ch., 193. *In re Chennell*, 8 Ch. Div., 492; *ex-parte Wainright*, 19 Ch. Div., 140. A widow put in a petition as guardian of her minor son for a certificate under Act XL of 1858, and stated that she was in possession of the whole property of her deceased husband, specifying a certain pergunnah. She was held liable for the costs of a party entitled to object to her getting a certificate to cover that pergunnah, although she did not in her petition expressly ask for it—*Feda Hossein* vs. *Ranee Khajoorunnissa*, 9 W. R., 459. In suits to determine the construction of a will, when a reasonable doubt may exist as to the meaning of the bequest or devise, costs are usually paid out of the residuary personal estate—*Wilkinson* vs. *Lindgren*, L. R., 5 Ch., 570. Where an estate or fund is administered by a Court, the costs of all the necessary parties are a first charge—*Ford* vs. *Lord Chesterfield*, 21 Beav., 426.

CHAPTER XIX.

OF THE EXECUTION OF DECREES.

Sales under the provisions of the Rent Law are governed by the provisions of this Chapter—*Azizoonnessa Khatoon* vs. *Kally Churn Sen*, 8 C. L. R., 498.

See the scope of this chapter decussed—*In re Ratansi Kalianji*, I. L. R., 2 Bom., 148.

A.—Of the Court by which Decrees may be executed.

Court by which decree may be executed.

223. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions hereinafter contained.

Where the Court which has passed the decree has ceased to have jurisdiction, application for execution may be made either to that Court or to the Court which (if the suit wherein the decree had been passed, were instituted at the time of making the application to execute it) would have jurisdiction to try the case—*Latchmun Pandey* vs. *Maddan Mohun*, I. L. R., 6 Cal., 513.

The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,

(*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(*b*) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(*c*) if the decree directs the sale of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(*d*) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

The Court which passed a decree may of its own motion send it for execution to any Court subordinate thereto.

The Court to which a decree is sent under this section for execution shall certify to the Court which passed it the fact of such execution, or, where the former Court fails to execute the same, the circumstances attending such failure.

If the decree-holder requires that the decree should be executed in the original district before the return of the certificate the original Court may recall the proceedings—*Ashootosh Dutt* vs. *Doorga Churn Chatterjee*, I. L. R., 6 Cal., 504. On the other hand if the judgment-debtor has out of Court partly satisfied the debt, subsequent to the transmission of the decree for execution to another Court, but before actual execution has been applied for, he is entitled, on execution being demanded, in full, to an order from the Court to which the decree has been transferred, calling upon the decree-holder to certify the fact of such payment—*Rajendranath Roy* vs. *Chunnoomal*, I. L. R., 5 Cal., 448.

If the decree has been passed in a case cognizable by a Court of Small Causes and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificate respectively mentioned in clauses (*a*), (*b*) and (*c*) of section 224; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

If the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, if the Court to which the decree

is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

This section applies to H. C., M. S. C. C., and P. S. C. C.

(*a*.) The terms here used are those contained in section 17 (*b*). See note thereunder.

(*b*.) Before a Court will act in such a case, it will require to be satisfied in some manner, by sworn testimony or by affidavit, that these facts exist. Where a decree has been executed by a Court other than that in which it was passed, the title of the purchaser cannot be avoided by shewing that there was property of the judgment-debtor within the jurisdiction of the Court that passed the decree which might have been attached and sold—*Kally Prosunno Bose* vs. *Denonath Bose Mullick*, 219 W. R., 435.

(*c*.) "Outside the District"—*not* outside the jurisdiction of the particular Court. If the immoveable property directed to be sold is situate, *within* the District within which the Court which passed the decree is situate, but outside the local jurisdiction of that Court, the proper order to pass would be to transfer the matter to the Court of the Judge having jurisdiction—*Obhoy Churn Coondoo* vs. *Golam Ali*, I. L. R., 7 Cal., 412.

Where an estate entered on the towjee of a district consist, of villages of which only the greater number are situated within that district, it may, for the purpose of execution, be considered as wholly situated in that district—*Kally Prosunno Bose* vs. *Denonath Bose Mullick*, 19 W. R., 434; but a Munsif cannot sell a talook, a portion of which lies beyond his local jurisdiction—*Unnoocool Chunder Chowdhry* vs. *Hurrynath Kundoo*, 2 C. L. R., 334.

A decree given in the District of Burdwan was executed there as far as possible. The decree-holder then applied to the Court to have it executed in three other Districts, asking that certain specified properties should be there attached, but that the properties in one particular district should be first sold, and that if the decree should be then unsatisfied, the properties in the other Districts should in turn be sold. The Court accordingly issued the necessary certificates (such as are now required by section 224) to the Courts of these three Districts and the properties were attached. The question was then raised and tried whether such attachments were valid and according to law, and it was held by the Privy Council that they were good attachments and could be made if a Court should, in exercise of its discretion, think fit to do so. Their Lordships remarked:

"It would, no doubt in many cases, be a right exercise of the discretion of "the Court not to act on the power and to refuse to send a decree for concurrent "execution into several places; and when it did act on it, it would be in many cases "proper to impose terms on decree-holders, that they should not proceed to sale "under all the attachments at once."—*Saroda Prosad Mullick* vs. *Luchmeeput Doogur*, 17 W. R., 289; 10 B. L. R., 214; 14 Moore, 529.

A decree may be sent for execution to another Court either on the application of the decree-holder on one of the grounds stated in this section, or by the Court which passed it of its own motion, but in this latter case the transfer can be only to a Subordinate Court. Looking to the terms of section 2, when defining the terms "District" and "District Court," it would seem that such a transfer could be properly made only by a District Court or a High Court, and not by a Subordinate Judge, to a Munsif. Under Act VIII, 1859, section 284, no decree could be transferred for execution unless the Court in which it was passed failed to enforce execution. This does not seem to be the case under the present law—See *Kally Prosonno Bose* vs. *Dinonath Mullick*, 11 B. L. R., 56.

It will be necessary for the holder of a decree which has been transferred for execution to another Court to make due application for execution to that Court (section 230, *post*.) A District Court on receiving a decree transferred for execution can direct any Subordinate Court to execute it (section 226).

An application under this section is an application to enforce, keep in force a decree—*Husain Buksh* vs. *Madje*, I. L. R., 1 Alla., 525, see also I. L. R., 1 Alla., 582; *id*. 2 Alla., 284 *Chundee Coomar Roy* vs. *Bhogobutty Prosunno Roy*, I. L. R., 3 Cal., 238; *Kunei Seshajiri*, I. L. R., 5 Mad., 142.

See note on section 649, *post*.

224. **The Court sending a decree for execution under section 223 shall send**

Procedure when Court desires that its own decree shall be executed by another Court.

(*a*) a copy of the decree;

Where the decree has been destroyed, secondary evidence has been admitted. See note under section 230, paragraph 1, *post*. See also *The "Ava" and "Brenhilda,"* I. L. R., 5 Cal., 568.

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and

(*c*) a copy of any order for the execution of the decree, and, if no such order has been made, a certificate to that effect.

This section applies to H. C. and M. S. C. C.

Schedule IV contains a form (No. 134) of certificate.

The Court receiving a decree has all the same powers in executing it, as if it had been passed by itself; it can determine whether execution is barred—*Nursing Doyal* vs. *Hurryhur Saha*, I. L. R., 5 Cal., 897. See section 228.

See the latter portion of the note to section 223, regarding the powers of Small Cause Courts to transfer their decrees for execution elsewhere.

Copy of decree.—Where the validity of an attachment under a decree transferred to another District for execution was in dispute between the parties to a suit, with special reference to the fact whether a "copy of the decree" had been sent with the certificate; it was held by the Privy Council that the attachment having been made it must be presumed to have been correctly made (see section 114, Indian Evidence Act), and that consequently the onus lay on the party denying the fact —*Saroda Prosad Mullick* vs. *Luchmeeput Doogur*, 17 W. R., 289; 10 B. L. R., 214.

Court receiving copies of decree, &c., to file same without proof.

225. The Court to which a decree is so sent shall cause such copies and certificate to be filed, without any further proof of the decree or order for execution, or of the copies thereof, or of the jurisdiction of the Court which passed it, unless the former Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

This section applies to H. C. and P. S. C. C. and M. S. C. C.

The filing of the copies and the certificate is quite distinct from executing the decree, for which an application should be regularly made. See section 245, *post*.

Execution of decree or order by Court to which it is sent.

226. When such copies are so filed, the decree or order may, if the Court to which it is sent be the District Court, be executed by such Court or by any subordinate Court which it directs to execute the same.

This section applies to H. C.

A judgment of the Privy Council was sent for execution to the Judge of Ghazipore, who referred it to his Subordinate Judge. This officer finding that the land in dispute had been annexed to the District of Shahabad, transferred the case direct to the Judge of that district, who in turn, referred it to his Subordinate Judge. *Held*, that the proceedings were regular—*Pulukdhari Roy* vs. *Radha Pershad Singh*, L. R., 8 Ind. App., 165.

A Court of Small Causes within a District is subordinate to the District Judge. See section 2, "District Court."

227. If the Court to which the decree is sent for execution be a High Court, the decree shall be executed by such Court in the same manner as if it had been made by such Court in the exercise of its ordinary original civil jurisdiction.

Execution by High Court of decree transmitted by other Court.

This section applies to H. C. and M. S. C. C.

Ordinarily, a decree would be sent for execution to a High Court, only when it has been passed in a case not cognizable by a Small Cause Court, for in such a case it would be sent to the local Court of Small Causes. See section 223, *ante*.

Where a judgment is removed from an inferior to a superior Court under 1 and 2 Vict., Cap. 110, section 22, for execution, the superior Court has no jurisdiction to enquire into the merits or into the regularity of the proceedings in the Court below —*Willams* vs. *Bolland*, 1 C. P. D., 227; otherwise, if the decree has been passed without jurisdiction—*Bridge* vs. *Branch*, 1 C. P. D., 633.

228. The Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its orders in executing such decree shall be subject to the same rules in respect of appeal, as if the decree had been passed by itself.

Powers of Court in executing transmitted decree.

Appeal from orders in executing such decrees.

This section applies to H. C. and M. S. C. C.

Powers of Court Executing.—Application to execute the decree must be regularly made to the Court to which it has been sent (see sections 230—234), and that Court should proceed to execute it, as if the decree had been passed by itself. The functions of a Court in respect of the execution of the decrees of other Courts is judicial, not ministerial—*Gobind H. Walekar* vs. *Shidram Shidmark*, 7 Bom., 41, and confined to effecting the execution and to matters arising out of the proceedings in execution—*Jadu Roy* vs. *Farrell*, 6 B. L. R., App., 66. Thus the Court to which the decree has been transferred cannot alter, vary, or add to the terms of the decree—*Dwarka Pershad* vs. *Ranee Bankut Nurseya*, 2 Alla., 184, even to correct errors—*Rao Omra Singh* vs. *Sutun Lall*, 1 Alla., 168; nor can it accept payment in instalments contrary to its terms—*Sheo Pershad* vs. *Shiva Ram*, 2 Alla., 59; nor do or decide anything that should have been done or decided between the parties antecedent to the date of the transfer. Thus it should not permit an assignment of the decree—*Mohon Lall* vs. *Baroo Mull*, 6 Alla., 69; *Kadir Baksh* vs. *Ilahi Baksh*, I. L. R., 2 Alla., 283, section 232 *infra*; nor where the decree is more than one year old before its transfer should it issue an application calling on the defendant to shew cause why execution should not issue, since in all these cases the application should have been made to the first Court—*Ladkuvarbai* vs. *Ghore Shri Sarsangji*, 7 Bom., 62; *Jadu Roy* vs. *Farrell*, 6 B. L. R., App., 66; but it is otherwise when the question for decision has arisen from facts which are legitimately before the Court in the course of the execution. Thus the latter Court could issue a notice on the defendant to shew cause, if the decree had been transferred within one year of its passing, but remained unexecuted after that period *Chaganlal Narbheram* vs. *Jamnadass Mancharam*, 11 Bom., 19 (but see section 248, *infra*); and could also review an order striking off the execution case as long as the documents specified in section 224 remained filed in it—*Bagram* vs. *Wise*, 1 B. L. R., 91. The latter Court can decide whether the application is barred—In the matter of *Sumat Dass*, 13 B. L. R., App., 27; *Leake* vs. *Daniel*, B. L. R., Sup. Vol., 970; *Nursing Doyal* vs. *Hurryhur Saha*, I. L. R., 5 Cal., 897; *Khoda Buksh* vs. *Hurree Ram*, 2 Alla., 399. If there are different laws of limitation in the two Courts the law applicable to the proceedings in execution of the decree should be the law of the Court to which the decree has been transmitted for execution—*Leake* vs. *Daniel*, B. L. R. (F. B.), 970.

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The Court to which a decree has been sent for execution is bound to certify to the Court which passed it, the fact of its execution, or if it fails to execute it, the circumstances attending such failure. See section 223. The power of sending to a third Court a decree so received does not come within the terms "executing it," and therefore except as provided for by sections 226, 227, the Court to which a decree has been sent for execution is not competent to send it to another Court. The proper course is for the decree-holder to apply to the Court which passed the decree—*Shib Narain Shaha* vs. *Bepin Behari Biswas*, I. L. R., 3 Cal., 512.

Where a decree has been transferred for execution to another district, the first Court has no *locus standi* to call for the proceedings to determine the claim of a third party to property attached in execution in that district, for such a claim should be decided in the district in which the decree is under execution—*Indra Chand Doogur* vs. *Gopal Chunder Santia*, 11 W. R., 557 ; 3 B. L. R., 181.

Decrees of Courts established by Government of India in Native States.

229. A decree of any Court established by the authority of the Governor-General in Council in the territories of any Foreign Prince or State, which cannot be executed within the jurisdiction of the Court by which it was made, may be executed in manner herein provided within the jurisdiction of any Court in British India.

This section applies to H. C. and M. S. C. C.

Applicants under this section must shew that the Court passing the decree is one or other of the Courts referred to in this section. Thus, where it was not proved that the Court of the Dewan Ahilkar of Cooch Behar was a Court within British territories or established by the Governor-General in a foreign State, it was held that the Judge of Rajshahye had no jurisdiction to execute its decree—*Jadab Chandra Toi Paramanik* vs. *Dinanath Das*, 4 B. L. R.134. But see section 434, *infra*.

B.—Of Application for Execution.

Application for execution.

230. When the holder of a decree desires to enforce it, he shall apply to the Court which passed, the decree or to the officer, if any, appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.

The Court which passed the decree, &c.—Enforcement of a decree by a Court other than that which passed it can be obtained only after it has been regularly sent to that Court in the manner directed by sections 223, 224, *ante*.

A mortgage decree was given by the Munsiff of Manbazar. Shortly afterwards the land covered by the decree was transferred to the jurisdiction of the Munsiff of Katra ; and the head-quarters of the Manbazar Munsiffee were transferred from Manbazar to Burrabazar. *Held*, that an application for execution of the decree might be made either to the Burrabazar Court or to the Katra Court (See section 649, *post*)—*Lutchman Pandah* vs. *Muddun Mohun Shye*, 7 C. L. R., 521.

Application to enforce a decree should contain the particulars set forth in sections 235—238, *post*, and must be in writing, except in the case provided for in section 256, that is, "where the decree is for a sum of money, and the amount decreed does not exceed the sum of one thousand rupees." A Court may, in such a case, "*when passing the decree*, on the oral application of the decree-holder, order immediate execution," but only within the limits of its local jurisdiction, against the person or moveable property of the debtor.

If the records of the case have been destroyed, then the decree may be proved by secondary evidence—*Nuzur Banoo* vs. *Hossein Ali Khan*, W. R., 1864, p. 378, and see the remarks of Mitter, J., in the matter of *Kally Soondury Dabea*, I. L. R., 6 Cal., 595. See also *The "Ava" and "Brenhilda,"* I. L. R., 5 Cal., 568.

The Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor.

Davis vs. *Middleton*, 8 W. R., 282.

Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates (namely):—

(*a*) the date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same, or

(*b*) where the decree or any subsequent order directs any payment of money, or the delivery of any property to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.

An order directing a petition to be filed praying for a decree in terms of a Kistibundi, is not an order for the payment of money—*Balchand* vs. *Raghunath Das*, I. L. R., 4 Alla., 155.

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application.

Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years.

This section applies to H. C. and M. S. C. C.

Section 254 provides for the enforcement of a decree for payment of money; section 259 for the delivery of specific moveable property; and sections 263, 264 for the delivery of immoveable property.

Execution may be taken out for a portion of a decree in certain cases. For instance, a decree-holder may obtain a decree for possession of lands and for mesne profits to be assessed in execution. The decree cannot, therefore, be executed as regards *mesne profits* until the amount has been ascertained. That ought not to prevent the execution creditor from executing the decree as to that portion which is perfect and capable of execution, and so seizing the lands which have been decreed to him. But where the decree might be executed in its entirety, as, for instance, in the case just put after the mesne profits have been assessed and fixed, the decree-holder cannot take out one execution for the mesne profits, another for the costs, and another for the interest on the costs—*Huro Sunkur Sandyal* vs. *Taruck Chunder Bhuttacharjee*, 11 W. R., 488; 3 B. L. R., 114.

Application for Execution.—This means an application under section 235 or otherwise by which proceedings in execution are commenced, and not applications of an incidental kind made while they are pending—*Chunder Coomar Roy* vs. *Bhogobutty Prosonno Roy*, I. L. R., 3 Cal., 235., such as the issue of an attachment

proceeding—*Probhacararow* vs. *Potannah*, I. L. R., 2 Mad., 1. A mokhtar can not make an application—In re *Ishur Kant Bhadoree*, 24. W. R., 233; but if the application is not returned at the time it cannot afterwards be objected to on this ground—*Autoo Misrie* vs. *Bidhoo Mookhee Dabee*, I. L. R., 4 Cal., 605. As to *res-judicata* in regard to previous applications see *Delhi and London Bank* vs. *Orchard*, I. L. R., 3 Cal., 47; *Mungal Pershad Dechit* vs. *Srija Kant Lahiri*, L. R., 8 Ind. App., 123; *Mangunath Badrabhat* vs. *Venkatesh*, I. L. R., 6 Bom., 54; *Hurrosoondary Dossee* vs. *Juggobundhoo Dutt*, I. L. R., 6 Cal., 208.

In exercising its discretion to refuse execution at the same time against the person and property of the judgment-debtor, a Court should refuse to issue a warrant against the person of a *purda* lady, until it is satisfied by the decree-holder that he has no other means of enforcing his decree—*Maharanee Udhee Ranee Narain Coomaree* vs. *Sreemutee Baroda Soonduree Dabee*, 10 W. R., 21.

A having a decree against B in the district of Nuddea, in execution sold the rights and interests of B in a decree which B had obtained against a third party in the district of Beerbhoom, and then applied to the Court at Beerbhoom to execute that decree. The Nuddea Court had jurisdiction to sell that decree, and the application to execute it was properly made to the Court in Beerbhoom—*Ram Buksh Chuttangee* vs. *Maharajah Bunwaree Govind*, 10 W. R., 357; 2 B. L. R., 65.

A decree for partition determines the right of all the parties, and if one party applies for execution no other party need apply—*Sheikh Khorshed Hossein* vs. *Nobbee Fatema*, I. L. R., 3 Cal., 551.

The last clause of this section refers to limitation—*Sohan Lal* vs. *Harim Buksh*, I. L. R., 2 Alla., 281.

An order for execution under the Code of Civil Procedure made after notice has, on the original side of the High Court the same effect of reviving a judgment as *scire facias* had—*Aushootosh Dutt* vs. *Doorga Churn Chatterjee*, 8 C. L. R., 23.

Where a decree-holder seeks to execute a decree passed more than 12 years before application he is allowed only one opportunity to execute—*Sreenath Goohoo* vs. *Yusoof Khan*, I. L. R., 7 Cal., 556; and no subsequent application can be granted unless the debtor has by fraud or force prevented the decree from being executed within the 12 years—*Ashootosh Dutt* vs. *Doorga Churn Chatterjee*, I. L. R., 6 Cal., 504.

Diligence.—Under Act X of 1877, no execution could issue unless the Court was satisfied that due diligence had been used to procure complete satisfaction. This has been repealed, and it is very doubtful whether a Court can now deprive an execution creditor of his right to execute within time because he has not acted with sufficient diligence—*Byraddi* vs. *Dasappa* I. L. R., 1 Mad. 403. In connection wiht this portion of Act X of 1877, the mode of procedure laid down only applied when an application had been granted—*Anandrav* vs. *Thakurchand*, I. L. R., 5 Bom., 245; *Panauthuq* vs. *Harben Mux*, 9 C. L. R., 297; *Dewan Ali* vs. *Soroshibala*, 10 C. L. R., 111; I. L. R., 8 Cal., 297; *Sadikali Khan* vs. *Hussein Khan*, I. L. R., 2 Alla., 384, under *this section*, and the judgment-creditor was unable to satisfy the Court that he had been duly diligent in following it up—*Byraddi Subbreddi* vs. *Dasappa Rau*, I. L. R., 1 Mad., 403; *Ashootosh Dutt* vs. *Doorga Churn Chatterjee*, I. L. R., 6 Cal., 504; *Ram Kishen* vs. *Sedhu*, I. L. R., 2 Alla., 275; and the second application was not a mere amendment of the first—*Sreenath Goohoo* vs. *Yusoof Khan*, 9 C. L. R., 334. Any diligent attempt to procure complete satisfaction, even when unsuccessful, was sufficient—*Ram Shaye Singh* vs. *Degun Singh*, 6 W. R., Mis., 98; *Kondaraju Venkata Subbaiya* vs. *Rama Krishnamma*, 4 Mad., 75; but apparently—not as under Act XIV, 1859, section 20—proceedings taken to execute a decree obtained for possession, mesne profits and costs, in respect of one of these items, would not be sufficient. See *Jogesh Prokash Gangooly* vs. *Kalee Coomar Roy*, 8 W. R., 274; *Barodakant Roy* vs. *Ramkishore Dutt*, 8 W. R., 99.

An applicant who merely applied year after year, but took no further steps, would not be considered to have used diligence—*Tabur Singh* vs. *Motee Singh*, 8 W. R., 306; *Sheik Idoo* vs. *Sheik Besharoola*, 2 W. R., Mis., 10; *Chunder Coomar Roy* vs. *Ranee Shurut Soondaree Dabea*, 6 W. R., Mis., 37; nor would a decree-holder who, seeking to enforce a decree after more than a year, failed to have notice served—*Kristokant Bural* vs. *Nistarinee Debia*, 8 W. R., 268; and if a decree-holder were to apply for execution just within the three years, and after issue and service of notice refrain from proceeding further, it is probable that he would be considered as not having used due diligence—*Ramdhone Goor* vs. *Gooroo Dassee*, 13 W. R., 40; on the

other hand, it is probable that, if the heirs or representatives of a judgment-creditor were to seek execution without having taken out a certificate under Act XXVII of 1860, unless distinctly ordered by the Court to produce it, they would not be held wanting in diligence simply for that reason—*Kalichurn Singh* vs. *Ram Surun Singh*, 11 W. R., 204; *Adina Bibi* vs. *Sububunnissa Bibi*, 3 B. L. R., App., 142; *Lachmipat Singh* vs. *Wahid Ali*, 2 B. L. R., 194.

This section does not limit Art. 180, Schd. II. Act. XV. of 1877, and apparently does not apply to decree made by the High Court—*Mayavhai* vs. *Tribhuvan Das*, I. L. R., 6 Bom., 258.

Application by joint decree-holder.

231. If a decree has been passed jointly in favour of more persons than one, any one or more of such persons, or his or their representatives, may apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the representative in interest of the deceased.

If the Court sees sufficient cause for allowing the decree to be executed on an application so made, it shall pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

This section applies to H. C. and M. S. C. C.

Whole Decree.—Ordinarily all the decree-holders must join in an application to execute the decree—*Roy Goodar Sahoy* vs. *Dhunesher Koer*, 7 C. L. R., 117; but where there are several joint decree-holders, the Court can issue execution on the application of some of them or their representatives—*Teja Singh* vs *Raj Narayan Singh*, 1 B. L. R., 62; *Azizunnissa Khatun* vs. *Shashi Bhusan*, 2 B. L. R., App., 47; and this is the proper course to be followed by one of several decree-holders who wishes to take out execution—*Indro Coomar Doss* vs. *Mohinee Mohun Roy*, 15 W. R., 159. The application must be for the whole decree, and not for any fractional share that the applicant may consider himself entitled to—*Balkishoon Mahomed* vs. *Tazam Allee*, 4 Alla., 90; *Thakoor Dass Sing* vs. *Luchmeeput Doogur*, 7 W. R., 10; so where two out of several co-decree-holders applied to the Judge's Court to execute their share of a decree, it was held that the application was not one upon which the Court could proceed in execution, and that in appeal it could not be changed into an application to execute the whole decree—*Purna Chundra Mookerjee* vs. *Sarada Charn Roy*, 3 B. L. R., App., 21; and where, by inadvertence, execution issued for the separate shares, costs were refused—*Prannath Mitter* vs. *Moothooranath Chuckerbutty*, 6 W. R., Mis., 65; a defendant cannot object to the share claimed for himself by a decree-holder, and on that account refuse to pay into Court the entire amount—*Moharajah Satesh Chunder Roy* vs. *Saroda Pershad Mookerjee*, 5 W. R., Mis., 58; but as one joint decree-holder is not bound by the acts of another, who has compromised or received payment out of Court—*Balgobind* vs. *Bhowanee Deen*, 1 Agra. Mis., 16, the debtor would be wise in not paying unless jointly or to the extent of their admitted shares—*Mohema Chundra Roy* vs. *Pyari Mohun Chowdhry*, 2 B. L. R., App., 43; for ordinarily a joint decree-holder has no power to give a discharge out of Court to a judgment-debtor for more than his own share of the decree—*Mussamut Bibee Budhun* vs. *Massamut Hafeesah*, 4 C. L. R., 70; and if the decree is of such a nature that it cannot be satisfied in shares, as if it were to knock down a wall, one decree-holder may execute it, although the others have entered into a compromise with the defendant—*Inderjeet* vs *Sewaram*, 5 Alla., 16.

Although an application to execute a decree in part, is informal, yet if the proceedings taken upon it are in effect execution of the decree as a whole, they are good and valid—*Jugjeeban Goopto* vs. *Goluck Monee Debea*, 22 W. R., 354. A joint decree was passed in favour of A and B, each claiming one-half. Subsequently A applied for execution stating that B could not join in the application. B admitted that he had secured more than one half from the debtor; but the Court disbelieving this statement allowed execution to issue for the full amount. *Held*, A should only have issued execution for half the amount—*Brojeswari Chawdhranee* vs. *Trepoora Soonderre Dabea*, 3 C. L. R., 513; and where of two decree-holders one sold his share to the debtor, and delivered to him the certified copy of the Privy Council decree required for execution, and the other applied for execution, it was held that execution should issue leaving the Court in execution to decide under section 244 the share of the remaining decree-holder.—In the matter of the Petition of *Kally Soondery Dabea* I. L. R., 6 Cal., 595.

The concluding words of the first clause of section 231 are in accordance with the judgment in the case of *Teja Singh* vs. *Pokhur Singh*, 10 W. R., 95; 1 B. L. R., 62. Ordinarily, a certificate under Act XXVII of 1860 will be necessary to enable the representative of a deceased decree-holder to execute a decree, and if the representative be a minor, also a certificate of guardianship under Act XL of 1858, but the Court may, under section 456 of this Code, which, by section 647, is applicable to miscellaneous proceedings, such as proceedings in execution of a decree, appoint a guardian for the suit (or proceeding), or the Court may, under section 863, on the application of the legal representative of the deceased, not being a minor, enter his name on the record in the place of the deceased. If the deceased decree-holder be a person to whom the Indian Succession Act (X of 1865) applies, letters of administration should be taken out under section 179 of that Act. See also *Ponnam Pilath* vs. *Ponnane Pilath*, I. L. R., 3 Mad., 79.

In connection with this section a portion of the Limitation Act (XV of 1877) relating to the execution of decrees should be noted. Schedule II, Art. 179, Explanation 1 is to the following effect: "When the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number (*i. e.* the application for execution, or to take some step in aid of the execution of the decree or order), shall take effect in favour only of such of the said persons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all."—See *Shib Chunder Dass* vs. *Ram Chunder Poddar*, 16 W. R., 29.

Sufficient cause.—One of several decree-holders has no right to claim execution unless he satisfies the Court that he has sufficient cause for asking for execution alone and as this ordinarily cannot be properly done without hearing the other decree-holders, notice should be given to them and the application disposed of in their presence—*Umrith Nauth Chowdhry* vs. *Chunder Kishore Singh*, 21 W. R., 31. If the application is allowed, the Judge is bound to pass such order as is necessary to protect the interests of the non-applicants. The usual order is an order reserving, in express terms, their rights to share in the proceeds of the execution—*Tarasoondari Burmoni* vs. *Beharilal Roy*, 1 B.L. R., 28. Where a judgment-debtor had been arrested at the instance of two decree-holders, and one of them aided the Court peons in releasing him from custody, contrary to the express orders of the Court, it was held that the decree-holder so acting, had rendered himself liable for the amount of the decree—*Gunput Singh* vs. *Choonee Lall*, S. D., N. W., 1860, p. 457.

The fact that the petition of one of several decree-holders in applying for execution requires amendment because of the list of property being incomplete, is no ground for declaring such application to be superseded by a later application, made before the completion of the necessary amendment, by another co-decree-holder for execution—*Sheikh Ahmed Chowdhry* vs. *Shazada Khatoon*, 7 C. L. R., 537.

Appeal.—An appeal lay from a decision under Act VIII, 1859, section 207, as to the distribution of the assets realized—*Tarasoondari Burmoni* vs. *Beharilal Roy*, 1 B. L. R., 28; but no appeal lay from an order refusing to allow one of several joint holders to execute—*Odhoya Pershad* vs. *Mohadeo Dutt Bhandaree*, 7 W. R., 415; see section 588, *post*.

Application by transferree of decree.

232. If a decree be transferred by assignment in writing, or by operation of law, from the decree-holder to any other person, the transferree may apply for its execution to the Court which passed it; and, if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided as follows:—

(*a*) where the decree has been transferred by assignment, notice in writing of such application shall be given to the transferror and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution:

(*b*) where a decree for money against several persons has been transferred to one of them, it shall not be executed against the others.

This section applies to H. C. and M. S. C. C.

There is no express provision in the Code for abatement of proceedings in execution. When it is brought to the notice of the Judge that the judgment-creditor is dead, he should strike off the proceedings by default, leaving the legal representative to apply within the period of limitation—*Dulari* vs. *Mohan Singh*, I. L. R., 3 Alla., 759. A valid assignment of a decree under the present Code must be *in writing*; but it need not be registered. Act III, 1877, section 17 (*j*).

A *benamidar* has no *locus standi* under this section; the person having the beneficial interest is the transferree—*Abdul Kureem* vs. *Chukhun*, 5 C. L. R., 253.

Court which passed it.—Application for the execution of a decree can be made by the assignee of such decree only to the Court which passed it, and not to the Court to which it may have been sent for execution—*Sheo Narain Singh* vs. *Hurbuns Lall*, 14 W. R., 65; 5 B. L. R., 497; *Nakoda Ismail* valad *Ahmed Barucha* vs. *Kasam* valad *Azam Dupli*, 9 Bom., 46; *Framji Rustamji* vs. *Ruttansha Pestanji*, 9 Bom., 49; but it should be borne in mind that the term decree-holder includes any person to whom a decree or order may have been transferred—section 2, *ante*.

The actual substitution of the name of the assignee for that of the decree-holder is not necessary for the validity of the proceeding in execution. The law merely requires the assignee to apply for execution of the decree under assignment—*Syud Nadir Hossein* vs. *Baboo Pearoo Thovildarinee*, 19 W. R., 255; but his name should be brought on the record —*Balkishoon* vs. *Mohamed Tazam Allee*, 4 Alla., 90; but see *Dhuronidhur Sen* vs. *The Agra Bank*, I. L. R., 5 Cal., 86, p. 91. The mere fact that a decree has been assigned to a third party for his benefit, though by agreement in the name of another, will not prevent execution being taken out in the name of the ostensible decree-holder—*Purna Chandra Roy* vs. *Obhoya Chandra Roy*, 4 B L. R., App., 40; and a judgment-debtor cannot object that the decree has been transferred by assignment to a third party, so long as such assignment has not been notified to the Court by one of the parties to it and been duly recognized—*Khettur Mohun Chatterjee* vs. *Ishur Chundra Surma*, 11 W. R., 272.

If that Court thinks fit.—The Court may, in its discretion, grant or refuse an application to execute by a transferree—*Megh Narayan Sing* vs. *Radha Prasad Sing*, 4 B. L. R., 200; *Hera Roy* vs. *Baboo Gujadhur Pershad Narain Singh*, 24 W. R., 286; and he is not entitled to it as of right like the original decree-holder—*Shama Puddo Dutt* vs. *Nobin Chunder Bose*, 15 W. R., 283. If there is no dispute the Court might admit him at once, or if the dispute is one that it can try, it can decide the point and upon the result of the trial admit or refuse the application—*Bistoo Churn Bhoosun* vs. *Kishen Gopal Misser*, 13 W. R., 207. On application for the execution of such a decree the Court should issue notice to the debtor, and on fair objection, should, under the discretion given by section 232, refrain from granting the application for execution, leaving the assignee to his remedy against the assignor—*Rughu Nundun Ram* vs *Somessur Panday*, 22 W. R., 235; 13 B. L. R., 489. The fact that there are cross-decrees is a good reason for refusing to recognize an assignment of one of them—*Juddoonath Roy* vs. *Ram Buksh Chulunges*, 8 W. R., 202. The decrees must, however, be such as are capable of being dealt with as cross-decrees; a decree obtained subsequently to the assignment of another decree is not a cross-decree—*Kusseemoonnissa Bibee* vs. *Hill*, 15 W. R., 127; but if there is no such objection, and the decree has been transferred, and the transfer is admitted by the decree-holder in Court, the debtor cannot contest the right of the transferree to execute it, except on plea of payment to the original decree-holder—*Sunnooburnissa Khanum* vs. *Meher Chand*, W. R., 1864, p. 323.

If the application is sanctioned, then the transferree is entitled to all the privileges of the decree-holder, and to have the decree executed as if the application had been made by the petitioner—*Shamanund Surma* vs. *Sumbho Chunder Doss*, 7 W. R., 205; *Chowdhry Wahed Ali* vs. *Mussamut Jumaee*, 19 W. R., 87; *Rughoo Nundun Ram* vs. *Somissar Panday*, 22 W. R., 235.

There is no prohibition or rule of law against the assignment of a rent-decree, more than any other decree—In re *Junmejoy Mookerjee*, 14 W. R., 215.

Transferree.—The transfer must have been from "the decree-holder to any other person." A instituted a suit and, dying before judgment, his wife C carried on the suit as his representative and got a decree. It was held that D, who claimed as heir of A, could not execute the decree so long as C was alive and did not transfer her rights to him—*Abedoonissa Khatoon* vs. *Ameeroonissa Khatoon*, L. R., 4 Ind. App., 73. Where a decree was assigned to A for his benefit in the name of B, the ostensible owner B was allowed to take out execution—*Purna Chunder Roy* vs. *Abhaya Chunder Roy*, 4 B. L. R., App., 40; and where S obtained a decree against D, the owner in possession, and subsequently in a suit brought by J against S, a decree was passed by consent, that J should execute S's decree;

it was held that J was a transferree within the section—*Doorga Pershad* vs. *Lallah Juggunnath*, S. D., N. W., 1869, p. 34. It is doubtful if this section would apply to the transfer of a part and not of the whole decree—*Seetaput Roy* vs. *Syud Ali Hossein*, 24 W. R., 11; *Huro Sunkur Sandyal* vs. *Tarruck Chunder Bhuttacharjee*, 11 W. R., 488; 8 Ben., 114.

It is not essential that the representative should in every case have obtained a certificate under Act XXVII, 1860, before he can be allowed to execute—*Rajah Gopal Singh Deb* vs. *Gopal Chunder Chuckerbutty*, 7 W. R., 394.

If the deceased died while the suit was pending on appeal the first amendment of the record, if application be made to execute, is to put in place of the name of the deceased the names of those persons, if any, allowed by the Court to carry on the appeal—*Kazee Syud Abdoolah* vs. *Syud Reasut Hossein*, 20 W. R., 51.

The last proviso to section 232 contains the law laid down by the Full Bench of the Calcutta High Court in the case of *Digamboree Dabee* vs. *Eshen Chunder Sein*, 9 W. R., 230, and in 15 W. R., 373, by a Division Bench of that Court in continuation of the same case. Purchase of a decree is not the same as satisfaction of it—*Nupher Chunder Mundal* vs. *Punchee Mundal*, 1 Shome, 187. The proper course is by a suit for contribution. See also *Pogose* vs. *Fukurooddeen Mahomed Ahsan*, 25 W. R., 343.

A mortgagor in possession sold 2 annas share of his right in the property to A and gave him a lease of the remaining 14 annas. A subsequently brought the mortgagee's decree. *Held*, he could execute it—*Kally Doss Bhadury* vs. *Golam Ally Chowdhry*, 3 C. L. R., 237, and a mortgage-decree for the amount of the mortgage-debt may be transferred to the assignee of a portion of the equity of redemption—*Nafer Chund Mundul* vs. *Baikant Nath Roy*, 4 C. L. R., 156.

Where a person claiming to be the assignee of a decree, obtains satisfaction of it, and his title is subsequently declared to be invalid, the debtor cannot sue to recover the money so paid unless he can shew that he has been in some way defrauded by the transaction, or that the person receiving payment was not the assignee of the decree, and that consequently the decree is still unsatisfied as between him and the decree-holder. The mere fact that the Court of a Deputy Collector acted *ultra vires* in allowing the assignment, gives no cause of action—*Ram Gobind Singh* vs. *Gheenoo Singh*, 20 W. R., 406.

Practice.—An order under this section disallowing the objections raised by judgment-debtor to execution by a transferree is a decree and is appealable by the debtor—*Murlidhar* vs. *Parsotum Das*, I. L. R., 2 Alla., 91; but when the person claiming a transferree is refused execution he cannot appeal—*Sobha Bibi* vs. *Mirza Sakhawat Ali*, I. L. R., 3 Cal., 371; *Pogose* vs. *Catchick*, I. L. R., 3 Cal., 708; and generally no decision of a dispute between the decree-holder and transferree is appealable—*Gyamonee* vs. *Radha Romon*, I. L. R., 5 Cal., 592.

Decisions under this section are only summary for procedure purposes, and are not decisive of the civil rights of two or more parties, each claiming to be transferree. A regular suit will, in such a case, lie—*Abedoonissa Khatoon* vs. *Ameeroonnissa Khatoon*, L. R., 4 Ind. App., 73, and so will an injunction to restrain execution—*Dhuronidhur Sen* vs. *The Agra Bank*, I. L. R., 4 Cal., 380; 4 C. L. R., 380; I. L. R., 5 Cal., 86.

As to an insufficient assignment of a decree, see *Gonesh Lal Tewari* vs. *Sham Naraian* 6 C. L. R., 533.

Transferree to hold subject to equities enforceable against original holder.

233. Every transferree of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

This section applies to H. C. and M. S. C. C.

The transferree by execution holds subject to the equities which may be enforced against the original decree-holder, and will be bound by constructive notice in the same way as an ordinary purchaser—*Ram Lochun Sircar* vs. *Ram Narain*, 1 C. L. R., 296; and will hold subject to the rights of the judgment-debtor to set-off a cross-decree—*Kaim Ali Joardar* vs. *Luckhy Kant Chuckerbutty*, 10 W. R., 32.

If the mortgagee of two villages purchases the right, title and interest of them in execution against the mortgagor under another decree, he cannot throw the entire debt on the unsold village—*Gossyn Luchmee Narain* vs. *Bikram Singh*, 4 C. L. R., 294.

A assigned to B his right in a decree obtained by him against a certain person. B afterwards had the decree set aside and the suit reheard when a decree was again given in favour of A. Thereupon D attached it for a debt due to him by A. *Held*, that D's claim was prior to B's—*Grish Chunder Sein* vs. *Obhoy Churn Mullick*, 6 C. L. R., 498.

If judgment-debtor die before execution, application may be made against his representative.

234. If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.

Act VIII, 1859, section 210. This section applies to H. C. and M. S. C. C.

This section omits the power given by section 210, Act VIII, 1859, to execute a decree *against the estate* of a deceased judgment-debtor.

Representatives—It is only when the death of the defendant takes place after the decree has been made that it can be executed against the legal representative. Where a party to a suit dies before it is decided, and judgment is given against him, it is incapable of being enforced—*The Representatives of Girendronoth Tagore* vs. *Huronath Roy*, 10 W. R., 455; 14 B. L. R., 334, note.

The Legislature has omitted to declare what are the characteristics of a legal representative in these sections—*Greender Chunder Ghose* vs. *Mackintosh*, 1. L. R., 4 Cal., 897, p. 908., 4 C. L. R., 193. It is clear that, in cases in which the Succession Act and Hindu Wills Act apply, the executor or administrator alone is the legal representative—Section 179, Act X, 1865; *Pogose* vs. *Catchick*, I. L. R., 3 Cal., 708., and a person cannot be put on the record on the mere ground that he is in possession of property, so long as there is a legal representative on the record. The judgment-creditor is not in a position to follow in execution such property of the debtor as is in the possession of such person and not in that of the legal representative except through the latter—*Syud Nadir Hossein* vs. *Bissen Chand*, 3 C. L. R., 437, 1 Shome, 82; and see the remarks of Sir Montague E. Smith at p. 245, L. R. 3 Ind. App.: though he could have done so under Act VIII of 1859—*Dhunput Sing Bahadoor* vs. *Ranee Rajessuree*, 15 W. R., 476 no regular suit will lie against the person in possession of the property by the decree-holder, though it might on behalf of an auction purchaser of the decree, or a manager under section 503 *post*—*Mirza Mahomed Agha* vs. *Widow of Balmakund*, L. R. 3 Ind. App., 241., p 245.

In a decree in which a Hindu widow is defendant in her representative capacity, the heirs of her husband are her legal representatives—*Ramkishore Chuckerbutty* vs. *Kally Kanto Chuckeabutty*, I. L. R., 6 Cal., 479.

It has been held that a person taking possession of the estate of a deceased Hindu (who has left a will of which no probate has been granted) must be treated as his representative until a claimant comes forward—*Prosunno Chunder Bhuttacharjee* vs. *Kisto Chytuno Pal*, I. L. R., 4 Cal., 343; but this was not absolutely necessary for the decision of the case which might be supported on the principle laid down in 1 Moore, p. 444.

In the case of joint ancestral property of a Hindu family living under Mitakshara law, the property of a son after his father's death is liable for the father's debts, provided that they are not illegal or contracted for some immoral purpose—*Girdharee Lall* vs. *Kanto Lall*, 22 W. R., 56; 14 B. L. R., 187; L. R., 1 Ind. App., 321.

The successor to an unsettled polliem is not liable for the debts of the person whose heir he is, as respects that polliem. The polliem reverts absolutely to the Government, and by their fresh grant to the successor a newly created estate for life becomes vested in him—*D. Arbuthnot* vs. *Oolaguppa Chetty*, 5 Mad., 303.

As regards Muhammadans and Hindus, if the heir has disposed of to a *bonâ fide* purchaser, property which he has inherited, the creditor cannot follow the property into the hands of the purchaser; but the heir is liable to account for the assets he has received—*Zuburdust Khan* vs. *Indurmun*, 1 Agra, F. B., 71; *Unnopoorna Dassee* vs. *Gunga Narain Paul*, 2 W. R., 296; *Campbell* vs. *Delanney*, Marsh., 509; *Doss* vs. *Doss*, Fulton, 33; *Syud Berzayut Hossein* vs. *Doolichund*, I. L. R., 4 Cal., 402; and similarly the executor of a Muhammadan can sell the estate of the deceased to pay his debt—*Kalee Narain Roy* vs. *Ram Coomar Chand*, W. R., 1864 p. 99; *Wahidunnissa* vs. *Sheebrattun*, 6 B. L. R., 54. As to the law regarding enheritance in the mofussil generally, see *Musleah* vs. *Musleah*, Fulton, 420.

From section 234 it would seem that an application under it can be made only to the Court which passed the decree, but from section 248, and more particularly from the explanation at the end thereof, it would seem that the Court to which a decree has been sent for execution, is competent to take preliminary proceedings in such a matter, by issuing the notice to call upon the alleged legal representative of the deceased judgment-debtor to shew cause.

Practice.—When an application is made under this section, the Court must in the first place issue notice on the person named, calling on him to shew cause why the decree should not be executed against him, as legal representative; but if the Court has on a previous application issued execution against him no notice is necessary—section 248—*Maharajah Deheraj Mahatab Chand Bahadoor* vs. *Mussamut Pearee Dassee*, 6 W.R., Mis., 61; *Lalla Poorihit Lall* vs. *Mussamut Sabeerun*, 7 W. R., 368; if the Court considers that he is the legal representative, it may apparently enter his name on the record without trying the question whether or not he had assets—In the matter of the petition of *Hira Lall Mookerjee*, 6 B. L. R., App., 100; *Avul Khadar* vs. *Andhu Set*, 2 Mad., 423; *Chowdhry Wahed Ali* vs. *Mussamut Jamaee*, 11 B. L. R., 155; *Shurfun Bibee* vs. *Collector of Sarun*, 12 B. L. R., 66, note; 10 W. R., 199, but see *Dhurinedhur Sen* vs. *The Agra Bank*, I. L. R., 5 Cal., 86 p. 91. It would then be for the decree-holder in the first place to make search for the property of the deceased; and if no such property could be found then to prove that some of the property of the deceased had come into the possession of the representative, and if this were proved, it would lie on him to shew that he had properly disposed of the property, and upon his failing to prove that he would be personally liable to the extent of it—*Rajah Roodro Narain Roy* vs. *Nityanund Doss*, 8 W. R., 195; *Chowdhry Wahed Ali* vs. *Mussamut Jamaee*, 11 B. L. R., 155; even though he pleads that the debtor was merely a *benamee* holder—*Doorga Soonduree Debia* vs. *Soorjo Monee Debia*, 8 W. R, 101. But his liability extends no further—*Syud Jafur Hossein* vs. *Hingun Jan*, 8 W. R., 161. So where a representative made payments in satisfaction to the full value of the property of the deceased which had come into his hands, it was held that he was no longer liable, although the decree-holder might be able to prove that he had property in his possession which originally belonged to the deceased—*Ram Golam Dobey* vs. *Ayma Begum*, 12 W. R., 177. In accounting, mesne profits, whether they have accrued in the shape of rents collected, or interest on moneys which may have come to him from the estate of the deceased, must be brought into the account. Where no such account was given, the Court held that the decree could be executed to the extent of the assets which it found had come into his hands and had not been accounted for—*Aseemoonnissa Beebee* vs. *Ameeroonnissa Khatoon*, 15 W. R., 285.

No appeal lies by the person placed on the record as legal representative by the judgment creditor—*Raygo* vs. *Pogose*, I. L. R., 3 Cal., 709; but the order may be set aside by proceeding on revision—*Pogose* vs. *Catchick*, I. L. R., 3 Cal., 709; or by a regular suit—*Ahedannissa* vs. *Amerunnissa*, I. L. R., 2 Cal., 327; or if this is barred by limitation by an injunction restraining execution—*Dhuronidhur Sen* vs. *The Agra Bank*, I. L. R., 5 Cal., 86.

Where a person states that the property attached in execution of a decree is held by him as his own estate and not as the legal representative of the deceased judgment-debtor, the matter should be determined in the course of those proceedings, and the parties should not be referred to a regular suit—*Ameeroonnissa Khatoon* vs. *Meer Mahamed Mozuffur Hosein Chowdhry*, 20 W. R., 280; 12 B. L. R., 65. Where the Judge refused to hear the objections of a person who though reversioner denied that he was the representative of the judgment-debtor and a Hindu widow placed him on the record held he was not barred subsequently from shewing that the decree only covered the widow's interest—*Kanai Lall Khan* vs. *Sashi Bhuson Biswas*, I. L. R., 6 Cal., 777.

An order vesting the estate of a judgment-debtor in the offical assignee does not give him a greater interest in it than the insolvent had. An order for the sale of certain property belonging to the insolvent, which was under attachment in execution of a decree when the vesting order was passed, is legal, notwithstanding that order, and the sale is valid—*Anand Chunder Pal* vs. *Panchoo Lall Soobalah*, 5 B. L. R., 691.

The representative of a deceased plaintiff in an abated suit is liable for costs of interlocutory orders in the suit—*Syud Mahuddee Allee Khan* vs. *Prince Roheemuddeen*, Bourke, 154.

Contents of application for execution of decree.

235. The application for the execution of a decree shall be in writing, verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of

the case, and shall contain in a tabular form the following particulars (namely)—

(*a*) the number of the suit;

(*b*) the names of the parties;

(*c*) the date of the decree;

(*d*) whether any appeal has been preferred from the decree;

(*e*) whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree;

(*f*) whether any and what previous applications have been made for execution of the decree and with what result;

(*g*) the amount of the debt or compensation, with the interest, if any, due upon the decree, or other relief granted thereby;

(*h*) the amount of costs, if any, awarded;

(*i*) the name of the person against whom the enforcement of the decree is sought; and

(*j*) the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, by the arrest and imprisonment of the person named in the application, or by the attachment of his property, or otherwise as the nature of the relief sought may require.

This section applies to H. C. and M. S. C. C.

There is nothing in the Civil Procedure Code which prevents a suit being brought upon a decree of the High Court—*Attermony Dossee* vs. *Hurry Doss Dutt*, 9 C. L. R., 357; *contra*, see *Fakirapa* vs. *Panduraugapa*, I. L. R., 6 Bom., 7.

It is unneccessary to furnish a copy of the decree when application is made for execution to the Court which passed it—*Modhoo Dassia* vs. *Nobin Chunder Roy*, 16 W. R., 25; *Gunga Gobind Goopto* vs. *Makhun Lall Hatee*, 9 W. R., 362; *Khetter Mohun Chuttapodhya* vs. *Issur Chunder Surma*, 11 W. R., 271; *Ram Dhun Rukhit* vs. *Punchanun Chuckerbutty*, 10 W. R., 144, but it is usual to do so. If, however, the decree-holder should obtain permission to execute the decree through another Court, a copy of it (section 224) must be sent to that Court by the Court which passed it, and this is always supplied by the decree-holder, having been prepared at his expense (section 217.) See note under section 230 para. 1, *ante*. Where only one of several decree-holders apply, his application should give the details required by the section, or else it may be held not to be an application within this section such as would bar limitation—*Ram Dhun Roy* vs. *Khajah Abdool Gunnee*, 9 W. R., 390; and where an applicant claimed as transferree by purchase and failed to prove the transfer, his application was similarly dealt with—*Oodoy Chaund Lashkar* vs. *Nobo Coomar Poramanick*, 10 W. R., 428; but where one of several representatives applied for execution of the whole decree, it was held that he did not require a power-of-attorney from the others—*Ambvaram Hariballabh Dass* vs. *Himalsing Kalianji*, 2 Bom., 103; and where the decree-holders do not themselves apply, the applicant must shew that he is the representative of some of them. Thus

where a minor sued by his guardian and next friend, obtained a decree, and died, it was held that his representative and not the next friend could take out execution—*Hullodhur Roy Chowdhry* vs. *Judoonath Mookerjee*, 14 W. R., 162.

An application *in writing* to execute a decree is dispensed with in certain cases, (see section 256). It must be written on paper bearing a stamp of one anna when made to any Court other than a principal Civil Court of original jurisdiction, if the amount or value of the subject-matter is less than fifty rupees. In other cases the stamp fee is eight annas, except the Court is a High Court, when it is two rupees. Court Fees Act (VII of 1870) sch. II, Art. 1.

An application for execution was made by a Mokhtar and admitted by the Judge who ordered a notice to issue on the judgment-debtor. *Held*, that such an application could not, after the notice was issued, and on the occasion of a subsequent application, be set aside as having been irregularly filed—*Dhunput Singh* vs. *Lilanund Singh*, 2 B. L. R., App., 18; *Autoo Misree* vs. *Bidhoomookee*, I. L. R., 4 Cal., 605. So where a decree-holder instead of applying in a regular manner merely prayed issue of notice it was held that the debtor could not object to the form after he had contested the application and pleaded limitation—*Chunder Coomar Roy* vs. *Chunder Kishore*, 1 Shome, 18.

Limitation.—Applications should be made within the period prescribed by the law of limitation, and section 230, *supra*. It has been held that a refusal to execute does not bar a subsequent application—*Hurrosoondary Dassee* vs. *Jugobundhoo Dutt*, I. L. R., 6 Cal., 203; but see *Mungal Pershad Dichit* vs. *Grija Kant Lahiri Chowdhry*, L R., 8 Ind. App., 123; and the remarks of Melville, J., at I. L. R., 6 Bom., p. 59. See *ante*, "Application for execution," p. 202.

In the case of a mortgage decree on the original side of the High Court, six months time is usually allowed for repayment of the principal and interest; but the Court may allow the decree to be satisfied at once—*Chotoolal* vs. *Miller*, 7 C. L. R., 267.

Under section 58, Act VIII, 1869 (B.C.) execution cannot issue unless the application has been made within three years from the date of the judgment—*Sreemutty Goluck Mony Debia* vs. *Mohesh Chunder Mosa*, 1 Cal., L. R., 149, and the cases there cited.

Whether any appeal has been preferred from the decree.—So where the decree is that of a High Court, or of an inferior Court affirmed by the High Court, and appealable to the Privy Council, if such an appeal has been presented, or if proceedings are being taken for that purpose, the decree-holder should state the fact; and, though he is bound only to state that an appeal has been preferred, it would add to his good faith if he also states when any preliminary proceedings for that purpose have been or are being taken—In re *Toondun Singh*, 14 W. R., 205.

Whether any and what adjustment, &c.—Section 258 requires every adjustment of a decree to be certified to the Court whose duty it is to execute the decree, and further enacts that no adjustment shall be recognized unless it has been so certified. Notifying an adjustment in an application under section 235 to the Court will be held to satisfy the requirements of section 258—*Maharaj Dheraj Mahtab Chand Bahadoor* vs. *Moorleedhur Ghose*, 15 W. R., 67. If a decree-holder fails to certify satisfaction made out of Court, the debtor may recover the amount by an action for damages—*Gunamani Dasi* vs. *Prankishori Dasi*, 5 B. L R., 223; or sue out an injunction prohibiting execution—*Nobokishen Mookerjee* vs. *Debnath Roy Chowdhry*, 22 W. R., 194; but money paid in excess of what was due can only be recovered in execution—*Kashee Kishore Roy Chowdhry* vs. *Kishen Chunder*, 15 W. R., 160. See note under section 257, *infra*.

An adjustment, such as is contemplated by (*e*), may also be the result of an application under section 210, by which payment of the money decree may be ordered to be by instalments.

The name of the person against whom enforcement is sought.—The name of the original debtor (if he be dead) and of his legal representative against whom enforcement is sought, should be shewn here. Execution can be taken out only against those whose names are mentioned in the application, without reference to the decree itself—*Sheikh Abdool Kureem* vs. *Syud Jan Ali*, 18 W. R., 56; but see as to this case—*Mussamut Nusurun* vs. *Moulvi Ameeruddeen*, 24 W. R., 3. In connection with this matter it is important to note the Limitation Act (XV, 1877), sch. II. Art. 179, *Explanation I*:—"When the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payble or deliverable by each, the application shall take effect against only such of the

said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all."

The mode in which the assistance of the Court is required.—Section 230, para. 2, makes it discretionary with a Court to permit execution to be taken out simultaneously against the person and property of the judgment-debtor. A mere request that the amount of the decree may be recovered without any specification of the mode in which the Court was desired to aid in the recovery is not a proper application—*Frauks* vs. *Nuneh Mal*, 7 Alla., 79. Rejection of one petition as informal is no bar to the execution of a second amended application—*Gibbon* vs. *Sheo Purshan Misser*, 17 W. R., 236.

The Court executing a decree has no right to order the decree-holder to proceed against one debtor, and afterwards, if his debt should remain unsatisfied, against the other debtors—*Ram Coomar Chowdhry* vs. *Ram Mohun Chowdhry*, 5 W. R., Mis., 44. But where a person recovered his debt against A by sale of property already mortgaged to B with other estates it was held that although the sale did not release the property sold still the mortgagee was bound to take measures in the first place to recover his debt from the other property—*Nowa Koowar* vs. *Abdool Ruheem*, W. R., 1864 p. 374.

In a suit by certain members of a joint Hindu family to recover from the auction purchaser certain immoveable property which had been sold in execution of a decree against one member of the family, a decree was obtained for possession subject to a lien in favour of the defendant for the repayment of the debt for which the original decree had been made, with interest at 6 per cent., up to date of realization. *Held*, that the condition in favour of the defendant was not a decree which was capable of being put in execution at his instance.—*Ramanagra Sing* vs. *Ramyad Sing*, 5 C. L. R., 176.

Otherwise as the nature of the relief sought may require.—These words mean that the mode of execution is to be adapted in each case to the nature of the particular relief sought to be enforced under the decree—*Denonath Ruchit* vs. *Mutty Lall Paul*, 1 Hyde, 158.

Decree-holders seeking khas possession of land already in the possession of a Surburakar under order of Court, should apply to the Court that appointed him—*Hurrish Kisto Doss* vs. *Moteechand*, 10 W. R., 445.

The manner in which a decree deciding the defendant pull down a wall, should be enforced is by imprisonment of the debtor, or attachment of his property, and if the mode in which the assistance of the Court is asked is wrong, the Judge should return the application for amendment—*Protab Chunder Doss* vs. *Peary Choudhrain*, I. L. R., 8 Cal., 174.

Joint Decree.—A joint decree can only be legally executed as a whole for the benefit of all the decreeholders—Collection of *Shekgahan Jour* vs. *Sarjan Singh*, I. L. R., 4 Alla., 78.

Several Debtors.—Where there is a joint, or a joint and several decree passed against two or more persons, the decree-holder may execute his decree against any of the persons he may select—*Sreenath Ghose* vs. *Sahib Ram Roy*, 12 B. L. R., 504, note; *Chowdhry Sheikh Waheb Ali* vs. *Mullick Enayet Hossein Ali*, 12 B. L. R., 500; *Kristo Kishore Chuckerbutty* vs. *Ram Lochun Burdhun*, 2 W. R., Mis., 49; and execution will not be stopped, though the person proceeded against shews that he has paid his proportionate part—*Salig Ram* vs. *Baboo Ram Sewuk*, 1 Agra, Mis., 14, or that the decree-holder has given a release to his co-debtors—*Sheo Churn Lall* vs. *Ram Surun Sahoo*, 16 W. R., 49. And where in execution of a decree passed against B and C, it was urged that C was a mere *benameedar*, and B was the real debtor, it was held that if B's property did not satisfy the decree, C would be liable—*Sookchand Shah* vs. *Tuppoossid Dassee*, 1 W. R., Mis., 14.

Application for attachment of moveable property to be accompanied with inventory.

236. Whenever an application is made for the attachment of any moveable property belonging to the judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the

property to be attached, containing a reasonably accurate description of the same.

This section applies to H. C. and M. S. C. C.

This section, it should be noted, refers only to an application for the enforcement of a decree by attachment of moveable property *belonging to the judgment-debtor, but not in his possession.* Sections 268, 272, prescribe the mode of attachment in such cases, the last-mentioned section referring to property deposited in or in the custody of any Court or public officer.

A decree may be attached and sold—*Ganesh Lal Tewari* vs. *Sham Narain*, I. L. R., 6 Cal., 213, at p. 217.

The law regarding the liability of the decree-holder for damages for seizure of meveable property belonging to a third party, and not to the judgment-debtor, is clearly enunciated, and all the previous decisions on the point are set forth, in the judgment of the Bombay High Court, in the case of *Vana Jagannathji* vs. *Hota Dipaji*, 11 Bom., 46—In that case the moveable property, rice, was seized and sold by the direct action of the decree-holder himself, and it was held to be quite immaterial so far as regarded his liability to a suit for the tort committed, whether or not he knew that the rice belonged to the third party. The decree-holder "ought, before he prompted the Court through its officer to seize the rice, to have ascertained that it belonged to the judgment-debtor. He chose, however, to run the risk of a wrongful seizure, and having done so he must now bear the consequence. There is not any universal rule that the judgment-creditor is, or that he is not, liable in suit for a wrongful seizure, or for injury to the goods while under seizure. His liability must depend upon the circumstances of the case, *i. e.*, upon the fact whether the wrongful seizure or the injury is the result of his own conduct. For instance if the judgment-creditor personally, or by his authorized agent (*e.g.*, his pleader), apply under section 214 (now section 236) of the Civil Procedure Code for the attachment of property, which is specially designated in that application, and if the Court grant its warrant for the seizure of that particular property, and the officer of the Court execute that warrant, and the property be not that of the judgment-debtor, the judgment-creditor would certainly be liable for the wrongful seizure; and the officer of the Court, on the other hand, could justify under the warrant of the Court, and would not be liable so long as he kept within the duty expressly prescribed for him by that warrant. But if the application of the judgment-creditor were for a general attachment under section 218 of the Code (not specially re-enacted in the present Code), and the Court took no such security from him as it might take under that section, and if the Court granted a general warrant for the attachment of the moveable property of the judgment-debtor, and the officer of the Court without any suggestion to that effect from the judgment-creditor or his agent, beyond a general direction to execute the warrant, were to seize property not belonging to the judgment-debtor, the judgment-creditor would not be responsible, inasmuch as the warrant which he sued out, and under which the officer of the Court purported to act, did not direct the officer to do what he did, and the latter (if the case were in England) would alone be liable for the tortuous act, which was exclusively his own. In the case of such a general warrant, the officer ought to be cautious not to act upon it until the judgment-creditor, or his agent, points out the goods to be seized as those of the judgment-debtor. A sheriff, if he have any doubt as to the ownership of the goods, generally demands an indemnity bond from the creditor before acting upon the writ. If he make the seizure, and the goods turn out to be those of a third person not the debtor, both the sheriff (in England) and the creditor who pointed out the goods as those of the debtor, are liable to an action of trespass. If in such a case the owner of the goods elect, as he generally does, to sue the sheriff, and to recover damages, the latter can recoup himself by suing the creditor on his indemnity bond. But even if the sheriff have neglected to take an indemnity bond, he is not without remedy, if the creditor had represented to him that the goods were those of the judgment-debtor, for an action on the case for deceit, *i. e.* for the misrepresentation, lies for the sheriff against the judgment-creditor, as was decided in *Humphrys* vs. *Pratt*, 5 Bligh., N. S., 154; S., C. 2 Dow & Cl., 288, by the House of Lords in 1831

"In India, however, the warrant is more usually special than general, being ordinarily issued upon an application for the attachment of particular property named in it, and thus the judgment-creditor becomes responsible if those goods be not those of his debtor. The officer of the Court may always make the judgment creditor responsible by declining to seize any goods until the latter or his agent points them out as the property of the debtor. In that case the officer will protect himself, even when the warrant is general, for although, if

under such warrant, he take goods not the property of the debtor, and the officer should become liable to the rightful owner, yet, as already shewn, the officer may recover from the judgment-creditor, as damages occasioned by his misrepresentation, any damages which he (the officer) has been compelled to pay to the true owner of the goods for the wrongful seizure. It must be recollected, however, that what we are discussing here is the question as to the extent of the liability of the Indian judgment-creditor, and not that of the nazir or other officer of Indian Mofussil Civil Courts. We have pointed out how the nazir or other officer may certainly avoid liability, or if he have incurred it, may recoup himself, but it is unnecessary for us now to discuss the extent of his liability, and we refrain from expressing any opinion upon it. In Bengal, a strong distinction has been taken between the liabilty of an English sheriff for the acts of his bailiffs and a Bengal nazir for the acts of a Court peon, partly founded on the Bengal Act V of 1863." See *Kalee Coomar Chatterjee* vs. *Siddhessur Mundul*, 11 B. L. R., 256; *Goma Mahad* vs. *Gokaldas Khimjee*, I. L. R., 3 Bom., 74; *Framji Besanji Dustier* vs. *Hormasji Pestonji Framji*, I. L. R., 2 Bom., 258 p. 271; *Raj Chunder Roy* vs. *Shama Sondari Debi*, I. L. R., 4 Cal., 583.

Further particulars when application is for attachment of immoveable property.

237. Whenever an application is made for the attachment of any immoveable property belonging to the judgment-debtor, it shall contain at the foot a description of the property sufficient to identify it, and also a specification of the judgment-debtor's share or interest therein to the best of the belief of the applicant and so far as he has been able to ascertain the same.

Every such description and specification shall be verified in manner hereinbefore provided for the verification of plaints.

This section applies to H. C.

The intention of this section being that the description of the property should be such as may be sufficient to identify it, where the property is an estate paying revenue to Government a specification of the revenue is necessary—*Lack Ram* vs. *Mohesh Doss*, 12 W. R., 488; where property was described as a *lakheraj* tank with four banks, the boundaries of which were given, the identification was held to be fully made out—*Maharaj Dheraj Mahtab Chand Bahadoor* vs. *Burodanath Mundul*, 18 W. R., 411.

When application must be accompanied by extract from Collector's register.

238. If the property be land registered in the Collector's office, the application for attachment shall be accompanied by an authenticated extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue or as liable to pay revenue for such land, and the shares of the registered proprietors.

This section applies to H. C.

Sections 237, 238, reproduce with slight additions and modifications, section 213, Act VIII, 1859. It was held under the last-mentioned law that, when the land to be attached was registered in the Collector's office, the decree-holder was bound to furnish all the information necessary to attach it as immoveable property, and also as land so registered, and probably the same rule will now be followed—*Ajoodhya Dass* vs. *Sheo Pershun Singh*, 11 W. R., 175. It should be noted that section 238 is not restricted to land registered in the Collector's office in the name of the judgment-debtor, for it frequently happens that the actual proprietors are not so registered.

The decree-holder is not bound to specify the names of all appurtenances to an estate registered in the Collector's office, such as, *aslee* and *dakhilaee* mouzahs, as they would necessarily be included in the estate, which was sufficiently described by its ordinary name and the amount of Government reveuue payable—*Zerkalee Koer* vs. *Lalla Doorga Prashad*, 16 W. R., 149.

C.—*Of staying Execution.*

When Court may stay execution.

239. The Court to which a decree has been sent for execution under this chapter shall, upon sufficient cause being shewn, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was made, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto;

and in case the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution or discharge of such property or person pending the result of the application for such order.

This section applies to H. C. and M. S. C. C.

The decree would have been sent for execution under section 223.

The Court having appellate jurisdiction, referred to in section 239, would be the Court having such jurisdiction over the Court which passed the decree. Any order made by the Court to which the decree has been sent for execution does not fall within section 239, because such orders when appealable are appealable to the Court having ordinary appellate jurisdiction over such Court. See section 228—*Mobaruck Ali* vs. *Soomee Runga Charee*, 3 Alla., 168.

Practice.—Before issuing process the Court is bound to see that the provisions of the Code have been strictly complied with by the Court transmitting the decree for execution. The documents required are: (1) a copy of the decree; (2) a certificate of any sum remaining due; and (3) a copy of the order of execution—*Venkata Subia* vs. *Sivarumappa*, 4 Mad., 331, and nothing more should be sent—*Lootfoolah* vs. *Keerut Chund*, 21 W. R., 330; so a roobacarie declaring petitioner is entitled to execute, without a copy of the decree and certificate, does not give the second Court jurisdiction—*Mussamut Dhunesh Koeree* vs. *Oolfut Hossein*, 21 W. R., 219.

A certificate which contains all the information requisite, though irregular in form, is a good certificate—*Mooktakeshi Dabea* vs. *Luchmeput Singh Doogur*, 10 W. R., 137.

When a decree has been transferred for execution to another district, the first Court has no jurisdiction to determine a claim to the property attached—*Indra Chand Doogur* vs. *Gopal Chunder Suntia*, 11 W. R., 557; 3 B. L. R., 181.

Power of executing Court.—Section 239 seems only to contemplate stay of execution on the application or objection of the judgment-debtor. This provision has been enacted to prevent precipitate execution when the decree itself or some order passed in execution is still under appeal, and also because the Court to which a decree has been sent for execution has no jurisdiction to decide such matters as the right of the decree-holder to execute the decree or the regularity of the transmission of the decree—*Shib Narain Singh* vs. *Gobind Dass Bhukul*, 23 W. R., 155; *Beer Chunder Manyka* vs. *Maymana Bibee*, I. L. R., 5 Cal., 736. See also—*Bulkiram Nathuram* vs. *The Guzrat Mercantile Asso.*, 4 Bom., 81.

A Court should stay execution if the debtor signifies his intention to apply for a re-hearing of the suit, which has been decreed against him *ex-parte*—*Mirtoonjoy Roy* vs. *John Cochrane*, 8 W. R., 202; 4 Wy., 93.

The Court should, however, in each case satisfy itself that sufficient cause has been shewn to stay execution, and that the debtor is not striving needlessly to impede execution, and execution should be stayed only for some specified and reasonable time. It has also full power under section 240 to impose such conditions on the debtor, as it thinks fit in justice to the decree-holder.

The executing Court has no power to alter, vary or add to the terms of the decree —*Forester* vs. *Secretary of State*, I. L. R., 3 Cal., 161; *Pillai* vs. *Pillai*, L. R., 2 Ind. App., 219; nor to correct errors—*Nilcomul Roy* vs. *Rohinee Dasia*, 13 W. R., 330; *Rao Omrao Singh* vs. *Satun Lall*, 1 Alla., 168; nor accept payment in instalments contrary to its terms—*Sheo Pershad* vs. *Shiva Ram*, 2 Alla., 59; nor to enquire whether the balance certified to be due on the decree is correct—*Keshub Chunder Paul Chowdhry* vs. *Khelut Chunder Ghose*, 9 W. R., 361; nor to admit an assignee to be substituted for the decree-holder—*Sheo Narayan Sing* vs. *Hurbun Lal*, 5 B. L. R., 497; 14 W. R., 65; nor to entertain any question of the right of a transferree whose name is on the record and has taken out execution—*Ram Chunder* vs. *Mohendro Nauth Bose*, 21 W. R., 141; or of the right of the person asking for execution—*Mussamut Dhunesh Koaree* vs. *Oolfut Hossein*, 21 W. R., 219; nor to transmit the decree to a third district for execution—*Dhunput Sing Bahadoor* vs. *Wooma Sunkuree Goopta*, 21 W. R., 337; nor, when the decree is more than one year old before its transfer, should it issue an application calling on the defendants to shew cause why execution should not issue, since in all these cases the application should have been made to the first Court, and all the latter can do is to stop execution until such application may be preferred—*Ladkuwarbai* vs. *Ghoel Sri Sarsangji*, 7 Bom., 162; *Jadu Roy* vs. *Farrell*, 6 B. L. R., App., 66; *Latfullah* vs. *Kerat Chand*, 13 B. L. R., App., 30; 21 W. R., 330; but see section 248, *infra*; though it could issue a notice on the debtor to show cause if the decree had been transferred within one year of its passing, but remained unexecuted after that period—*Chagan Lal Narbheram* vs. *Jumnadas Mancharam*, 11 Bom., 19; or review an order striking off the execution case as long as the documents specified in section 224 remained filed in it—*Bagram* vs. *Wise*, 1 Ben., 91; but see *Brojendro Narain Roy* vs. *Benode Ram Sen*, 11 W. R., 269; or determine the claim of a third party to property attached in execution—*Indra Chund Doogur* vs. *Gopal Chunder Santia*, 11 W. R., 557; 3 B. L. R., 181. It can decide if application is barred—*Leake* vs. *Daniel*, B. L. R. (F. B.), 970; *Nursing Doyal* vs. *Hurryhur Saha*, I. L. R., 5 Cal., 897; *Choti Lall* vs. *Manickchand*, 7 Alla., 115.

See note under section 228, *ante*.

Power to require security from, or impose conditions upon, judgment-debtor.

240. Before passing an order under section 239 to stay execution, or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

This section applies to H. C. and M. S. C. C.

A pledged certain property to stay execution in the case of B *vs.* C and afterwards sold the property conditionally to D who obtained a decree for foreclosure and possession. Subsequently the lands were put up for sale in execution of the decree for which A had pledged them as security. D objected. *Held*, that the property was in the first instance liable for the lien on it under the security bond—*Mudoa*, pititioner, S. D. A., Sum. Decis., April 25, 1843.

Liability of judgment-debtor discharged to be re-taken

241. No discharge under section 239 of the property or person of a judgment-debtor shall prevent it or him from being re-taken in execution of the decree sent for execution.

This section applies to H. C. and M. S. C. C

Ordinarily, a debtor once discharged after arrest cannot be re-arrested in execution of the same decree. See section 341.

Order of Court which passed decree or of Appellate Court to be binding upon Court applied to.

242. Any order of the Court by which the decree was passed, or of such Court of Appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

This section applies to H. C. and M. S. C. C.

But the ordinary Court of Appeal would still exercise its jurisdiction in respect of any order passed by the Court to which a decree was sent for execution. Section 228.

Under this section and 244 (*c*) the Court to which a decree has been transferred execution has jurisdiction to determine whether or not such decree is bound by limitation—*Nursingh Dyal* vs. *Hurryhur Saha*, 6 C. L. R., 489; I. L. R., 5 Cal., 897.

Stay of execution pending suit between decree-holder and judgment-debtor.

243. If a suit be pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may (if it think fit) stay execution on the decree, either absolutely or on such terms as it thinks fit, until the pending suit has been decided.

This section applies to H. C. and M. S. C. C.

Any Court to which a decree is transmitted for execution Law proceed under this section and stay execution if the suit between the judgment-debtor and holder of the decree is pending in such Court and not in the Court which transmitted the decree—*Cooke* vs. *Mussamut Hiseebu Bibee*, 6 Alla., 181.

The holder of a mortgage decree has nothing to do with disputes between the representatives of his mortgagor, and suits respecting such disputes form no ground for staying execution of the mortgage against the mortgaged property—*Krishna Mohinee Dasi* vs. *Shyama Churn Nag*, 9 C. L. R., 344; I. L. R., 7 Cal., 733.

Appeal.—An appeal lies from an order staying execution—*Krishna Mohinee Dasi* vs. *Shyama Churn Nag*, 9 C. L. R., 344; I. L. R., 7 Cal., 733.

The High Court can, also, examine the judicial propriety of the order, and if it considers that the order was not a proper one, it can, in the exercise of its extraordinary jurisdiction, set that order aside—*Gambhirmal* and *Banachand* vs. *Chejmal Jodhmal*, 11 Bom., 151. Execution stayed in that case was on account of costs incurred, which the High Court held were liable to immediate payment irrespective of subsequent or further litigation.

D.—Questions for Court executing Decree.

Questions to be decided by Court executing decree.

244. The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely)—

(*a*) questions regarding the amount of any mesne profits as to which the decree has directed inquiry;

(*b*) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree;

(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree.

Decree-holder includes any person to whom the decree is transferred. See section 2, *ante*.

The holder of a decree against a *firm* attached certain property as that of the *firm*. One of the partners objected on the ground that the property was his private property. *Held* that the order disallowing the objection was one under section 281, and not under this clause—*Abdul Rahman* vs. *Muhamadyar*, I. L. R., 4 Alla., 190; see also *Kanai Lall Khan* vs. *Sashi Bhusan Biswas*, I. L. R., 6 Cal., 777, 8 C. L. R., 17; see "Suit to Establish Right," section 283, *post*.

Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.

This section applies to H. C. and M. S. C. C.

Representatives.—This would refer to persons by whom or against whom the decree may be executed under sections 231, 232 and 234—*Bishto Narain Banerjee* vs. *Gunga Narain Biswas*, 11 W. R., 368. The term includes subsequent representatives in point of interest and is not confined to heirs or executors. But if an interest come into existence before the decree, the owner of it is not a representative—*Rash Behari Mookerjee* vs. *Maharani Surnomoyee*, I. L. R., 7 Cal., 403.

Parties to the suit.—The question must arise between parties to a *suit*. A proceeding under section 53 Act XX of 1866 is sufficient—*Bhekambhat* vs. *Fernandez*, I. L. R., 5 Bom., 673.

A purchaser at a sale in execution of a decree is not a party—*Bhoondur Mull* vs. *Gunga Pershad*, 2 W. R., 50, Mis; nor is the purchaser of the rights of the judgment-debtor which were sold in execution of a money-decree obtained by the mortgagee, and subject to that mortgage, a party to the suit in which the decree was passed—*Narain Acharjea Chowdry* vs. *Gregory*, 8 W. R., 304; nor is one who, though he was originally made a defendant, was released from the operation of the decree—*Gour Kishen Chowdry* vs. *Mahomed Hosain Chowdhry*, 20 W. R., 191: but when an intervenor has been made a defendant and exempted from the operation of the decree, but was directed by the Appellate Court to pay costs, he still continues to be a party to the suit—*Hurree Kissore Roy* vs. *Kalli Kishore Sen*, 8 W. R., 114; 4 Wy., 71. The purchaser of a decree, in a question arising between him and his vendor, is not a party to the suit—*Soorasmony Dassee* vs. *Brijonath Majoomdar*, 1 Wy., 29; nor are rival decree-holders all seeking to attach the same property, as against one another—*Afzalonnissa Beebee* vs. *Parbutty Koonwur*, 1 Wy., 41, or disputing as to the distribution of the assets—*Missree Kowur* vs. *Maharaja Buksh Singh*, Marsh., 527; *Deen Dyal Sahoo* vs. *Radha Muddun Mohuni Doss*, 9 W. R., 223; 5 Wy., 156; nor is a third party who objects to the sale of the attached property—*Luchmeeput Singh* vs. *Lekraj Roy*, 2 W. R., 56, Mis.; nor a person claiming under a title created by the defendant subsequent to the institution of the suit—*Ameeroonnissa Khatoon* vs. *Abeedoonnissa Khatoon*, 16 W. R., 307; *Surubsookh* vs. *Ashgur Ali Khan*, 3 Agra, 180; nor an auction purchaser—*Luchmun Pershad* vs. *Ameer Ali*, W. R., 1864, Mis., 15; *Baboo Luchmee Narain* vs. *Baboo Bhairow Pershad*, 1 Agra, Mis., 5; but see in the matter of *Gurappa* bin *Rachappa*, 1 Bom., 90; nor is he a party who becomes a surety for the appearance of a party to the suit—*Sikhooram Agorwalla* vs. *Komola Kant Dey*, 2 W. R., 65.

A party sued in a representative character is a party to the suit within the meaning of this section—*Chowdry Wahed Ali* vs. *Mussamut Jumaee*, 11 Ben., 149; 18 W. R., 185; *Oseemunnissa Khatoon* vs. *Ameerunnisa Khatoon*, 20 W. R., 162; *Budhee Ramaiya* vs. *Venkaiya*, 3 Mad., 263. And so is a person who, before the passing of the decree, becomes surety for the due performance of the same or any part thereof—*Ghoree Lall Jha* vs. *Sheonarain Singh*, 8 W. R., 24; ex-parte *Bhikaji Vithal Ambekar*, 4 Bom., 119.

A having obtained a decree against a widow on a mortgage bond applied to execute it against B the reversioner as her legal representative. B denied that he was her representative, and the Judge instead of deciding the point put B on the record

directing that the dispute should be decided in a regular suit. *Held*, B could bring a suit to have it declared that the decree only bound the widow's estate—*Kanai Lall Khan* vs. *Sashi Bhuson Biswas*, I. L. R., 6 Cal., 777.

Questions regarding the amount of any mesne profits as to which the decree has directed inquiry—By section 212, *antè*, where a suit is for immoveable property and for mesne profits which have accrued prior to the institution of the suit, and the amount of such profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property and direct an inquiry into the amount of the mesne profits, and dispose of the same on further orders. But when the suit is for mesne profits *only*, the amount must be specified in the decree and cannot be left to be settled in execution—See *Bhoobunessuree Chowdrain* vs. *Manson*, 22 W. R., 160.

Decree has directed an enquiry.—It is only where mesne profits have been expressly given in the decree that the amount can be made the subject of inquiry; and, if they have been decreed, no new suit for them will lie—*Musoodun Lall* vs. *Bheekaree Singh*, 6 W. R., Mis., 109; *Horomohun Chowdrain* vs. *Dhonmonee Chowdrain*, 10 W. R., 62; 1 B. L. R., 138; *Eckowree Singh* vs. *Bijoynath Chatterjea*, 13 W. R., 11; 4 Ben., 111; *Radhabhai* vs. *Radhabhai*, 4 Bom., 181; *Sitaram Amrut* vs. *Bhagvant Jaganath*, 6 Bom., 109; *Subba Venkataramaiyan* vs. *Subraya Aiyan*, 4 Mad., 257; *Ramalinga Pillai* vs. *Suddasiva Pillai*, 7 Mad., 97. And if a suit is brought for immoveable property and mesne profits, and the decree is silent regarding mesne profits, unless this omission (supposing it to be accidental, as occasionally happens) be remedied on appeal or on review of judgment, the plaintiff's claim would be barred. See section 13, Explanation III.

As long as the amount of mesne profits due remains uncertain, the decree would apparently not fall within the terms of section 230, paragraph 3; but, as soon as it has been ascertained by an inquiry held under section 244, or if it has been determined by the decree itself, any application to execute the decree would be for payment of money, and would be subject to the special rule laid down in that clause, which requires a decree-holder to use due diligence to procure complete satisfaction of the decree, and bars any subsequent application for execution unless such due diligence be shewn to the satisfaction of the Court.

Mesne profits and interest on them are distinct subjects, and interest cannot be given in execution unless distinctly decreed—*Hurro Doorga Chowdhrain* vs. *Maharani Surut Soondari Dabi*, L. R., 9 Ind. App., 1.

Powers of Court executing Decree.—The only thing left to a Court of Execution to try under this section is the amount of mesne profits, when mesne profits have been awarded by the decree—*Pratap Chandra Burua* vs. *Rani Swarnamay* 4 B. L. R., 125; *Ram Kanye Ghose* vs. *Gooroo Prosunno Roy*, 16 W. R., 30, and this inquiry should be held as provided for in sections 392, 393, 397—400. Where the decree provides for the ascertainment of the amount of mesne profits at the time of execution, the decree-holder is not concluded by what he may have stated in his plaint as to their amount—*Hurro Gobind Bhukut* vs. *Digumburee Debia*, 9 W. R., 217; but if the amount allowed in the decree is in excess of the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the amount so decreed, shall have been paid to the proper officer—Court Fees' Act (VII, 1870) section 18.

Execution can issue to recover the amount of ascertained mesne profits, though inquiry may be still being held as to other mesne profits, but in ascertaining the amount of mesne profits, the Court has no power to alter its decree as to the interest awarded—*Sreemutty Arfunnissa Chowdhrain* vs. *Sreemutty Rokibunnissa Chowdhrain*, 24 W. R., 444. See note under section 212, *ante*.

"The amount of any mesne profits or interest which the decree has made payable."—By section 211, *ante*, when the suit is for land or other property yielding rent or other profit, the Court may provide in the decree for payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit; and it is to that section that the present clause refers.

Section 11, Act XXIII of 1861, left it in doubt whether that section, which is replaced by section 244 of this Code, was restricted to what was payable under a decree, or whether it would not also include what would be conse-

quential on the declaration in a decree; but this is now made clear and the rule now laid down is that the interest or mesne profits demanded must be expressly made payable by the decree, in accordance with the *consensus* of the decisions of all the High Courts, the correctness of which was doubted by the Privy Council in the case of *Sadasiva Pillai* vs. *Ramalinga Pillai*, 24 W. R., 193; L. R., 2 Ind. App., 219. See also *Raja Leelanund Singh* vs. *Maharajah Lakhmissur Singh*, 14 W. R., 23; 5 B. L. R., 605. So, where a person sues for mesne profits and the decree is silent in awarding interest or mesne profits, they cannot be obtained in execution of that decree, but application should be made for amendment of that decree, either through a review of judgment or by appeal, or, if allowed by the law, by a separate suit—*Radhabhai* vs. *Radhabhai*, 4 Bom., 181. See also *Mosoodun Lall* vs. *Bhekaree Singh*, 6 W. R., 109 Mis. and if it awards mesne profits but not interest the latter can not be given—*Hurro Doorga Chowdhrani* vs. *Maharani Sarat Sondari Debi*, I. L. R., 8 Ind. App., 1. The last clause of this section provides for "a separate suit for *mesne profits* accruing between the institution of the first suit and execution of the decree therein, when such profits are not dealt with by such decree," but that apparently would be only where they were not asked for in the plaint, for section 13, explanation III, would seem to bar a separate and subsequent suit if they were claimed but *not expressly granted by the decree*. See also *Pratab Burna* vs. *Swurnamaye*, 4 B. L. R., 113, *Ram Manickya Dey* vs. *Juggunath Gope*, I. L. R., 5 Cal., 565.

Interest.—Section 209 relates to interest in a suit decreed for a sum of money and distinguishes between, (1) interest to be paid on the principal sum adjudged for the period prior to the institution of the suit; (2) interest on the principal sum adjudged from the date of the suit to the date of decree; (3) further interest on the aggregate sum so adjudged from the date of decree to the date of payment or to such earlier date as the Court thinks proper. The interest payable from the date of the institution of the suit is to be at such rate "as the Court deems reasonable." The rate at which interest may be given *on costs* cannot exceed *six per cent. per annum.*—Section 222. See note under section 239, *ante*, pp. 171—174.

On the expiration of three years from the date of decree.—These words evidently refer to section 211, *ante*, which enable a Court to provide in its decree for payment of rent or mesne profits from the institution of the suit until delivery of possession of the immoveable property in suit, or until the expiratinn of three years from the date of decree (whichever event first occurs), with interest.

Relating to the Execution of the decree—The object of this part of sectiou 244 is, as pointed out in the case of *Oseemunnissa Khatoon* vs. *Ameeroonnissa Khatoon*, 20 W. R., 162, "that the Court, having the parties before it in the suit, it is proper that all questions between them relating to the execution of the decree should be determined, and that there should not be the expense of a separate suit to determine such questions. The most liberal interpretation ought to be given to the provision, in order to carry out what was the design of the Legislature." Thus all questions in connection with attachment or sale of property—*Polokdhari Roy* vs. *Radha Pershad Singh*, I. L. R., 8 Cal., 28, or regarding the appointment or removal of a receiver appointed in the administration suit *Mithibai* vs. *Limji Nowroji Bahaji*, I. L. R., 5 Bom., 45, a plea that the decree was fraudulently executed, it being barred by limitation, can only be determined under section 244—*Najabut Ali Chowdhry* vs. *Buseeroollah Chowdhry*, 20 W. R., 5; 11 B. L. R., 42; *Zumeer Sirdar* vs. *Aseemooddeen Sirdar*, 23 W. R., 257; and the person against whom, as representative of the deceased judgment-debtor, a decree has been executed on the ground that he had received property from the deceased, or that the property against which execution issued was the property of the deceased cannot bring a separate suit against his opponent to set aside those proceedings or recover the property, but should raise this defence in the course of the proceedings in execution—*Ossemunnissa Khatoon* vs. *Ameeroonnissa Khatoon*, 20 W. R., 162. See also *Chowdhry Wahid Ali* vs. *Mussamut Jumaee*, 18 W. R., 185; 11 B. L. R., 149, (but apparently he could bring a suit to recover the property from the purchaser on the ground that it belonged to him and not to the original debtor—*Dwarkanath Samoyee* vs. *Pratap Chunder Dutt*, 20 W. R., 233 and see the case of *Kanai Lall Khan* vs. *Sashi Bhusan, Biswas*, I. L. R., 6 Cal., 777) and no regular suit wile lie to enforce a decree against the representatives of a decree-holder deceased—*Mirza Mahomed Aga Ali Khan Bahadoor* vs. *Widow of Balmkkand*, L. R., 3 Ind. App., 241; or on a decree execution of which is barred—*Fakirapa* vs. *Pandurang Gappa*, I. L. R., 6 Bom., 7. So all matters connected with the restitution of property are to be decided in execution of decree—Section 583; *Hurro Chunder Roy Chowdhry* vs. *Shooroodhonee Debia*, 9 W. R., 402; *Lati Kooer* vs. *Mussamut Sahodra Kooer*, 2 C. L. R., 75, unless the case of questions arising out of an : djustment not certified to the Court—*Baba Mahomed* vs. *Webb*, I. L. R., 6 Cal., 786; *Shadi* vs. *Gangasahai*, I. L. R., 3 Alla., 538; but see *Patankar* vs. *Drogi*, I. L. R., 6 Bom., 246; and the ordinary rule is, that, where money, &c., has been taken in execution of a decree which is subsequently reversed or modified on appeal, no fresh suit will lie for its recovery the matter must be inquired into by the Court which

passed the decree as a question arising between the parties, relating to the execution of such decree—*Saligram Singh* vs. *Gobind Sahai*, 4 B. L. R., App., 64; see also *Nursing Churn Sen* vs. *Bidyadhuree Dassee*, 2 W. R., 275; *Jodoonath Gossain* vs. *Nobo Kishen Chatterjee*, 4 W. R., 66; so no regular suit will lie for the restoration of property assigned for the liquidation of a debt under a decree and for the surplus collections—*Sheodyal* vs. *Dowllakovr*, S. D., N. W., 1864, p. 318; nor for loss of profits during the period intervening between the date of possession obtained by the opposite party and that of the reinstatement of the plaintiff under regular decree—*Surubsookh* vs. *Asgur Ali Khan*, 3 Agra, 180; but see *Abhram Ali* vs. *Nathajallam*, 5 Bom., 74; nor for costs, or interest on costs or on the amount refunded—*Rodger* vs. *The Comptoir d' Escompte de Paris*, L. R., 3 P. C., 465; *Forester* vs. *The Secretary of State*, L. R., 4 Ind. App., 137; and where in execution of the decree the decree-holder obtained more lands than were given by the decree, and, in proceedings in execution, was compelled after some delay to relinquish them, he was also compelled to deduct mesne profits due therefrom from the amount of mesne profits to which he was entitled in the decree—*Bama Soondurse Debee* vs. *Tarinee Kant Lahoree*, 20 W. R., 415. A plaintiff in possession under a decree for land and mesne profits, or for land and the value of the crops, must enforce the mesne profits or the value of the crops in execution —*Lakshmi Narasimhalu* vs. *Chatrazu Jagannadham Pantalu*, 3 Mad., 287; *Sungara Narayana Pillay* vs. *Sandira Pillay*, 6 Mad., 13; and in the same way, if a party gets a decree for possession and does not execute it within time, he cannot bring a new suit against his opponent or his assignee for the same, and his right is extinguished; for this section takes away from the parties the right to raise by a fresh suit any question as to their rights and liabilities under the decree—*Kisan* vs. *Anandram*, 10 Bom., 433; *Ranganasary* vs. *Shappani*, 5 Mad., 375, and generally, money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests upon the ground that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and is recoverable either by summary process or by a new suit or action; and see the cases of *Shama Proshad Roy Chowdhry* vs. *Hurro Proshad Roy Chowdhry*, 10 Moore, 203; 3 W. R., P. C., 11, and *Kalichurn Dutt* vs. *Jogesh Chunder Dutt*, 1 C. L. R., 5, in which such suits were allowed. In the former case one of the parties obtained a decree, declaring that he was entitled to a certain share of a certain debt due to the family of which he was a member, but on appeal to the Privy Council, it was held that he was bound by a compromise by which the amount of that debt was settled at a smaller sum than he claimed. Before, however, that order was passed, he had sued for and obtained decrees for various sums of interest calculated on the larger sum, and had obtained payment thereof. The payer then brought a suit to recover the moneys paid under those decrees, and this suit was allowed by the Privy Council. In the latter case the parties were respectively landlord and tenant, and the landlord, having obtained a decree at an enhanced rate in the High Court, on the basis of that decree obtained further decrees for subsequent instalments which he realised. Meantime, the original decree was set aside by the Privy Council on appeal, and the tenant who had thus been exempted from enhancement of his rent, brought this suit to recover moneys which he had been compelled to pay in excess of the rent which the Privy Council had declared him to be liable to pay. A majority of the High Court held, on the authority of the case of *Shama Proshad Chowdhry* vs. *Hurro Proshad Chowdhry*, 10 Moore, 203; 3 W. R., P. C., 11, that such a suit would lie and in a similar case restitution was granted in execution and not by a regular suit—*Mahomed Elahi Baksh* vs. *Kally Mohun Mookerjee*, I. L. R., 5 Cal., 589.

A party has no remedy except process of execution if he is wrongfully disposed of property under colour of a decree—*Muttuvelu Pillai* vs. *Vythilinga Pillai*, 5 Mad., 185; *Rani Kattama Nachiar* vs. *Botha Gurusami Tevar*, 6 Mad., 293. And where, before decision of an appeal against the decree, it was put into execution and a sum realised by sale of the debtor's property, which sum, however, was in excess of the amount to which the decree was reduced by the Appellate Court, it was held that the Court which was charged with execution of the decree could alone determine the question and direct a refund. A separate suit was held to be inadmissible and was dismissed—*Mathoora Pershad Singh* vs. *Mohunt Shumbhoo Geer*, 19 W. R., 413, see also *Partab Singh* vs. *Beni Ram*, I. L. R., 2 Alla., 61. So also where the judgment-debtor complained in the execution proceedings that the decree-holder

had been put into possession of lands that were not covered by the decree, and his objection was disallowed by the Court executing the decree, a separate suit could not be brought by the judgment-debtor to obtain possession of those lands—*Jogendro Narain Koonwar* vs. *Ranee Surno Moyee*, 14 W. R., 39; *Ranee Shama Soondary Debya* vs. *Bejoy Govind Bural*, W. R., 1864, p. 331; *Prannath Roy Chowdhry* vs. *Preonath Roy Chowdhry*, 8 W. R., 398. But see *Rash Beharee Lall* vs. *Beebee Wajun*, 11 W. R., 516, where it was held that if the officer executing the decree should act contrary to its terms, his act cannot be considered to be an act done in execution of the decree, and therefore it was held to be open to the judgment-debtor to bring a separate suit to set aside such proceedings. See, however, 14 W. R., 40, for an explanation of that case. Where the debtor claimed the surplus sale proceeds relating to a previous decree under a compromise effected in another suit between him and other debtors, it was held that this was a matter that should be determined by the Court executing the decree—*Syud Velayet Hossein* vs. *Syud Wullee Ahmed*, 23 W. R., 207.

An application by the judgment-debtor for refund of money taken out of Court by decree-holder in excess of the amount of his decree is a question relating to the execution of the decree-limitation and possibly three years—*Sheikh Ally Hossein* vs. *Sheikh Muzha Hossein*, 4 C. L. R., 577. And where A obtained property under a decree which was reversed on appeal it was held that the Court executing the appellate decree was bound to make A give mesne profits in respect of the time he was in possession under the decree—*Lati Koer* vs. *Sobada Koer*, I. L. R., 3 Cal., 720. See also *Ruchapa* vs. *Amingovda*, I. L. R., 5 Bom., 283.

See note under section 243, *ante*, and section 258, *post*.

The judgment of the Privy Council in the case of *Sadasiva Pillai* vs. *Ramalinga Pillai*, 24 W. R., 193, L. R., 2 Ind. App., 219, goes beyond those of the Courts in India regarding the power of a Court executing a decree; for it was there held that such a Court could take an account of mesne profits subsequent to the institution of the suit, in which the decree was passed *not giving such mesne profits*, because to enable him to prosecute an appeal to the Privy Council and to retain possession meanwhile of the lands in litigation, the debtor had from time to time furnished security for such mesne profits as they fell due, and had undertaken to account for them. The Privy Council held that the debtor was estopped from saying that the profits were not payable under the decree, and said "the Court had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced in the case of *Pisani* vs. *Attorney-General of Gibraltar*, L. R., 5 P. C., 516, in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*." See also *Sheo Golam Ali* vs. *Beni Prosad*, I. L. R., 5 Cal., 27.

In a suit for possession on an usufructuary mortgage plaintiff obtained a decree to get possession of the property in order to repay himself out of the profits, keeping the usual accounts, and after satisfaction of his claim restored the property: *Held*, that he was bound to certify to the Court the amount received and outstanding, and that the Court executing the decree was empowered to deal with the matter as a matter relating to execution—*Golam Russool Khan* vs. *Kishen Mohun Shaha*, 23 W. R., 156.

A decree for money was lost or destroyed, and the decree-holder on suing out execution was referred to a regular suit. *Held*, that the existence of the decree and its terms should have been inquired into in execution—*Runjeet* vs. *Choonee Lall*, 1 Agra, 78.

Regular suit will lie.—But though the general rule is that a regular suit will not lie to set aside any orders passed in execution of decree—*Mussamut Amri Koonwer* vs. *Luchmee Narain*, 1 Agra, 93, this is not so if the order is passed without jurisdiction. Thus where, in execution of a decree for arrears of rent, the Court sold the judgment-debtor's immoveable property before his moveable property, it was held that he could sue to set aside the sale, although he had not opposed the illegal order passed in execution—*Rama Soonduree Dossee* vs. *Mudhoo Soodun Biswas*, 25 W. R., 156. Nor apparently will this section prevent a suit to set aside a decree as obtained by fraud—*Piragoopadhia* vs. *Mussamut Dooja*, S. D., N. W., 1864, p. 567.

A sued for possession of certain lands and obtained a decree. A portion of those lands had been taken up by the Government for public purposes, and the price deposited in the Collector's Court was withdrawn by the defendants without the knowledge of the plaintiff after the institution of the suit but before decree. *Held*, that a

subsequent suit for the money withdrawn would lie, and that it was not a question relating to the execution of the former decree. Limitation in such a suit held to be 3 years, but this is doubtful—*Roy Nund Lall Bose* vs. *Mir Abu Syed*, 5 C. L. R., 45. So where A, having obtained a decree for certain property against B, agreed to sell the decree to the latter; but subsequently ignoring the agreement took out execution for costs which B paid. *Held*, B could sue for the decree on the agreement to sell—*Sitaram* vs. *Mohipal*, I. L. R., 3 Alla., 533.

The orders must be issued in execution, and if the decree has been fully satisfied and the execution proceeding closed, no orders could be passed under this section, and a regular suit will lie. Thus where the defendant purchased property sold in execution, but instead of paying the purchase money into Court, he, with the plaintiff's consent, retained the whole sum upon the understanding that he should give the Court a receipt for himself and on behalf of plaintiff, and afterwards return to plaintiff his portion of the amount; it was held the decree being satisfied by the sale of the property, and the execution proceedings being at an end, a suit to recover the sum due to plaintiff would lie—*Ramanadan Chetti* vs. *Kunnapu Chetti*, 6 Mad., 304. If the nature of the suit or the matter complained of is such as cannot be decided in execution, or is not directly connected with carrying it out, a suit will lie. Thus, where a decree is merely declaratory and not capable of being carried out in execution, it may be enforced by a regular suit—*Jugurnath* vs. *Balgobind*, 1 Alla., 154; so where plaintiff's right to a monthly allowance was declared, it was held that on failure of the person bound to pay according to the terms of the decree a new suit would lie—*Nawazish Ali Beg* vs. *Velaytee Khanum*, 2 Agra, 23. And if a judgment-debtor pays the decree-holder a sum of money, or any property, by way of compromise, in full satisfaction of the decree, and the latter fails to certify the amount and executes the decree, a suit for the sum so paid will lie—*Gunamani Dasi* vs. *Pran Kishori Dasi*, 5 B. L. R., 223; *Muthra Chowdhry* vs. *Sheoruttun Mull*, 6 Alla., 126; so also a claim will lie for damages in respect of injury sustained by goods while under attachment in execution of a decree which was afterwards set aside—*Kashee Kishore Roy* vs. *Noor Khan*, 7 W. R., 45.

Where a question, such as provided for by this section, was not determined by an order of the Court executing the decree, but was made the subject of a regular suit in the same Court, it was held that, though the form of the proceeding was wrong, there was not such want of jurisdiction as could be made the ground of objection in special appeal, and that such objection should have been taken in the first Court—*Purmessuree Pershad Narain Singh* vs. *Jankee Kooer*, 19 W. R., 90.

Certain matters are sometimes erroneously left to be settled in execution of the decree. Thus, in a suit for accounts, it is not sufficient to decree that an account should be taken as that leaves the whole suit to be tried after the decree has been made; but the accounts should be produced in the course of the trial, and a regular decree passed after an examination of them; and if none be produced an opportunity should be given to the plaintiff to prove his claim to compensation or damages —*Luchmeeput Singh Bahadoor* vs. *Nundcoomar Goopto*, 22 W. R., 388. The proper mode of trying a suit for accounts is also stated in *Syud Shah Alaiahmad* vs. *Mussamut Beebee Nusibun*, 24 W. R., 70.

Appeal.—Orders under this section are appealable. But no appeal will lie if the order is not clearly within the section, such as where the applicant is not a representative—*Rash Behari Mookerjee* vs. *Maharani Surnomoyee*, I. L. R., 7 Cal., 403 or the question in dispute is as to the share of one of the co-decree-holders, otherwise if the dispute is as to the interest of a decree-holder whose co-sharer had sold his interest to the judgment-debtor—*Gyamonee* vs. *Radha Romon*, I. L. R., 5 Cal., 592. *In re Kally Soondury Dabee*, I. L. R., 6 Cal., 594. An appeal is allowed from proceedings under section 53 Act XX 1866—*Welayatun Nissa* vs. *Najibun Nissa*, I. L. R., 1 Alla., 583; *Vekambhat* vs. *Fernandez*, I. L. R., 5 Bom., 673.

Res Judicata.—A construction put upon a decree in execution proceedings will bar a subsequent suit—*Kali Mundal* vs. *Kadar Nath Chukerbutty*, 6 C. L. R., 215; *Mungal Pershad Dichit* vs. *Griga Kant Lahire*, L. R., 8 Ind. App., 123.

See *ante*, "Application for execution," p. 202, and "Limitation," p. 211.

Limitation.—The provisions of the Limitation Act (XV, 1877), regarding several questions relating to the execution of decrees should be borne in mind. See Sch. II of that Act, Articles 161, 165, 166, 167, 172, 174.

An application for refund of money overpaid in execution is not barred by limitation—*Shaikh Allij Hossein* vs. *Sheikh Muzhar Hossein*, 4 C. L. R., 577.

E.—Of the Mode of executing Decrees.

Procedure on receiving application for execution of decree.

245. The Court, on receiving an application for the execution of a decree, shall ascertain whether such of the requirements of sections 235, 236, 237 and 238 as may be applicable to the case have been complied with; and if they have not been complied with, the Court may reject the application, or may allow it to be amended then and there, or within a time fixed by the Court. If the application be not so amended, it shall be rejected.

Every amendment made under this section shall be attested by the signature of the Judge.

Procedure on admitting application.

When the application is admitted, the Court shall enter in the register of the suit a note of the application and the date on which it was made, and shall order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for money, the value of the property attached shall, as nearly as may be, correspond with the amount for which the decree has been made.

This section applies to H. C. and M. S. C. C.

Application.—The law does not require a copy of the decree to be filed with the application for execution—*Modhoo Dossia* vs. *Nobin Chunder Roy*, 16 W. R., 25; it only requires an application in the form prescribed in section 235, and on it the Judge can pass orders of execution—*Sufen Ali* vs. *Mohesh Chunder Kang*, 4 W. R., Mis., 16. An application should bear a stamp such as is required by the Court Fees' Act (VII of 1870,) Sch. II, Art. 1. If it corresponds with the terms of the decree it should be admitted—*Bisheshur Roy Chowdhry* vs. *Bisheshur Bose*, 8 W. R., 277; and if it is irregular in form it should not be rejected, but amended or returned for correction —*Chowdhry Purladh Mohapatur* vs. *Chowdhry Junardun Mohaputtur*, 6 W. R., Mis., 15.

Limitation.—Before admitting an application it will be necessary to see whether *primâ facie* it has been made within the proper time, and is not barred by limitation. See Act XV, 1877, Sch. II, Art. 179, and section 230 of this Code. If the decree-holder makes the application after the expiration of twelve years from the dates mentioned in section 230, he should state and be prepared to shew that "the judgment-debtor has by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application." The order of the Court under section 230 is conclusive evidence that the application is not barred—*Mungal Pershad Dichit* vs. *Grija Kant Lahiri Chowdhry*, L. R., 8 Ind. App., 123—*Annoda Proshad Rai* vs. *Sheikh Kurpan Ali*, 1 C. L. R., 408. Limitation in a decree which is against several debtors, but makes each separately liable for specific sums, as mesne profits, must be separately calculated against each of the debtors, since execution for realisation of the amount due from one debtor is no part of proceedings against another, but is a separate decree and must be separately considered in determining the point of limitation—*Chowdhry Hureshur Singh* vs. *Baboo Hridoy Narain*, 25 W. R., 310, following the judgment of the Full Bench in the case of *Wise* vs. *Rajnarain Chuckerbutty*, 19 W. R., 30; 10 B. L. R., 258; in which it was held that a decree against A for the rent of one period, and against B for another, is in fact two decrees, and must be separately enforced to avoid limitation. But where a decree has been passed against a number of persons jointly, the Court is not competent to treat it in any other way than as a joint decree, or to attempt (in executing it) to adjust the respective

liability of each of the debtors, and so restrict what are the decree-holder's rights under the terms of the decree—*Kally Mohun Pal* vs. *Dinonath Chuckerbutty Chowdhry*, 8 C. L. R., 34.

Register.—The register here referred to, is the register prescribed by section 58, *ante*, the form of which is set forth in Sch. IV, No. 116, *post*.

When the application is admitted the Court shall order execution of the decree according to the nature of the application.—If the application is admitted and the Court is not expressly given a discretion in the matter, as for instance, in issuing execution simultaneously against the person and property of the debtor, (section 230), the Court is bound to comply with the nature of the application made under this section in writing—*Davis* vs. *Middleton*, 8 W. R., 283. And in the case of *Seton* vs. *Wijohn*, 17 W. R., 168; 8 B. L. R., 255, it was held on appeal from an order of Phear, J., on the original side of the High Court, that he was not competent to refuse to issue execution against the person of the judgment-debtor on the ground that he had reason to believe, that the debtor had no means of satisfying the decree since previous attempts to execute it against his property had failed. The Court pointed out that by such a refusal the onus was thrown on the decree-holder to shew that the debtor was possessed of some property, whereas it was for the debtor to satisfy the Court by his own examination on oath that he had no property, before he could claim release from arrest.

The fact that certain property stated to be that of the judgment-debtor is the subject of a pending suit, is no reason why it should not be attached in execution of a decree against him, though the Court will exercise its own discretion as to its sale at the most fitting and proper time—*Ram Chunder* vs. *Nund Lall Bose*, 19 W. R., 132.

Shall be Rejected.—Although the time fixed by the Court has expired, yet if the application has not been rejected and finally disposed of, the Judge can allow further time—*Kaminy Mohun Somoddar* vs. *Gopal*, I. L. R., 8 Cal., 479.

Execution.—Execution should be in accordance with law, and not by consent of the parties. Thus where the judgment-debtor, a Railway employée, with the consent of the decree-holder gave orders on the Paymaster of the Railway Company to pay into Court certain sums out of his monthly salary, such an arrangement should not have been accepted by the Court, and, as the Paymaster refused to recognise it, it could not be enforced—In re *Macfarlane*, 11 W. R., 69; but see the case of *Sadasiva Pillai* vs. *Ramalinga Pillai*, L. R., 2 Ind. App., 212. This section does not contemplate any enquiry whether the property belongs to the judgment-debtor or not—*Subjan Bibi* vs. *Shaikh Sariatoolla*, 3 B. L. R., 413. The procedure laid down applies to all applications for the execution of decrees, whether made to the Court which passed the decree or to the Court to which it has been sent by that Court for execution (section 230). The different modes of executing decrees are set forth in the following sections, but it should be noted that it is discretionary with the Court to "refuse execution at the same time against the person and property of the judgment-debtor," (section 230,); and that "when a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution thereof by issue of a warrant, directed either against the person of the judgment-debtor, if he is within the local limits of the jurisdiction of the Court, or against his moveable property within the same limits," (section 256.)

The holder of a decree under which several persons are jointly liable, can proceed against any one of the debtors—*Sreenath Ghose* vs. *Saheb Ram*, 12 W. R., 305. The fact that he may have given a release to some of the joint-debtors does not prevent him from executing it against the others, who can sue their co-debtors for contribution whether a release has been granted or not—*Sheo Churn Lall* vs. *Ram Surun Sahoo*, 16 W. R., 49; *Nunkoo Lall* vs. *Mussamut Dhunesh Kooer*, 17 W. R., 496. On the other hand the person asked to contribute is not estopped by the joint decree from raising any equitable defence he may have against the person sueing him—*Syed Ali Ahem* vs. *Mohun Mobton*, 1 Shome, 54; *Asman Singh* vs. *Must Ajnas Koer*, 2 C. L. R., 406. But as between the debtors jointly liable, if one of them purchase the decree it operates as a satisfaction of the entire decree and execution can no longer be taken out—*Digambaree Debia* vs. *Eshan Chunder Sen*, 15 W. R., 372. See also Full Bench, 9 W. R, 230. It may also be objected in the course of proceedings taken in execution that the decree-holder is only the *benameedar* of one of the co-debtors, or that one of the co-debtors is to some extent interested from having purchased a portion of the decree, and such

objections may be taken at any time, and even if they were not taken in the course of previous proceedings—*Obhoy Churn Roy Chowdhry* vs. *Nobin Chunder Roy Chowdhry*, 23 W. R., 95.

It is not competent to a Court executing a decree to vary it in any way, though through carelessness in the mode of expression in the terms of the decree, a Court is often called upon to interpret it. Thus, where a decree was for payment of a certain sum of money as rents due, and, on non-payment within fifteen days, for ejectment of the tenant debtor, the Court executing the decree was not competent to alter or extend the time fixed for payment—*Sunkur Singh* vs. *Hurree Mohun Thakoor*, 22 W. R., 460.

When a mortgagee sues upon his mortgage bond, and his claim is decreed, the decree should be satisfied out of the mortgaged property, and not out of the right, title, and interest which remain in the mortgagor. The purchaser at the execution-sale acquires all the interest which passes by the mortgage to the mortgagee and any interest that may remain to the mortgagor. If there be a second mortgage, all that it could pass from the mortgagor would be his equity of redemption, and the decree in a suit on such a mortgage could only authorize the sale of the equity of redemption, unless the first mortgagee had been made a party to the suit and his mortgage shewn to be invalid, or the second mortgagee to be entitled to priority—*Doolal Chunder Dutt* vs. *Goluckmonee Debia*, 22 W. R., 360.

Cross-decrees.

246. If cross-decrees between the same parties for the payment of money be produced to the Court, execution shall be taken out only by the party who holds a decree for the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

If the two sums be equal, satisfaction shall be entered upon both decrees.

Explanation I.—The decrees contemplated by this section are decrees capable of execution at the same time and by the same Court.

Explanation II.—This section applies where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

Explanation III.—This section does not apply unless the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and the sums due under the decrees are definite.

Illustrations.

(*a*) A holds a decree against B for Rs. 1,000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this section.

(*b*) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this section.

(*c*) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this section.

This section applies to H. C. and M. S. C. C.

Every transferree of a decree holds it subject to the equities (if any), which the judgment-debtor might have enforced against the original decree-holder (section 233)—See *Kaim Ali Joardar* vs. *Lukhee Kant Chuckerbutty*, 10 W. R., 32; 1 B.L.R., 23;

Nundcoomar Bukshee vs. *Koonjo Kishore Roy*, 6 W. R., Mis., 73. Where execution of A's decree against B was stayed pending the passing of a decree in B's cross suit: *Held* that no subsequent purchase of B's rights and interests in his cross suit could be set up as a bar to A's rights to attach the whole of the decree in the cross suit, in execution of his decree against B—*Mussamut Peloo Chowdrain* vs. *The Court of Wards*, 7 W. R., 219.

Explanation I.—It should be noted that both or all the decrees which it is intended to set-off against one another must be *produced* to the Court before which execution of any of them is being taken, or such Court will not have jurisdiction over them all. If one of them should have been passed by another Court, application for its transfer should be made under section 223. So, Act VIII of 1859, section 209, which provided for the set-off of cross-decrees, only applied to decrees of the same Court, or decrees sent to a Court for execution. Therefore where, on an application for execution of a decree in the Court of a Principal Sudder Ameen, it was sought to set-off a decree obtained in the Judge's Court which had not been sent to the Principal Sudder Ameen, for execution. *Held*, that there could be no set-off—*Grishchandra Lahury* vs. *Fakir Chand*, B. L. R., F. B. R., 503.

Explanation III.—The holder of the smaller decree, which it is intended to set-off against another and larger decree, should be careful to do so before his own decree is barred by limitation, when his adversary can take advantage of this and execute his decree in full, unless steps have been taken in time to enter satisfaction for the smaller sum in the manner provided for by this section—*Reazoodeen Hossein* vs. *Fuzloonissa*, 5 W. R., 12. A judgment-debtor is entitled to set-off a decree whether the judgment-creditor may or may not intend to appeal against the judgment-debtor's decree—*Huro Pershad Roy Chowdhry* vs. *Shama Pershad Roy Chowdhry*, 5 W. R., Mis., 2.

By analogy to this section, where there is only one decree and not cross-decrees, the party entitled to the smaller sum cannot take out execution against the party entitled to the larger—*Jugo Mohun Bukshee* vs. *Soorendranath Roy Chowdhry*, 13 W. R., 106; execution should only issue for the difference—*Amjud Ali Khan* vs. *Syud Fazul Hossein*, 19 W. R., 187.

It has been held that, when one of the parties to a decree is said to be the *benamee* of a third party, the decree is not capable of being treated as a cross-decree —*Tarachand Ghose* vs. *Anund Chunder Chowdhry*, 10 W. R., 450; 2 B. L. R., 110. Cross decrees have been set-off where the parties to the decrees were not the same, but the debts on which the decrees were based were due between the same parties—*Bhagawani Kunwar* vs. *Lala Baijnath Prasad*, 2 B. L. R., 84; and a decree obtained against a Hindu widow for a debt due by her husband has been set-off against a sum due to herself for costs—*Grish Chunder Lahory* vs. *Koomaree Dabea*, 1 W. R., Mis., 23; but where S and two others got a joint decree for costs against A, it was held that A could not set-off a decree for money against S—*Murlidhur* vs. *Parsotam Dass*, I. L. R., 2 Alla., 91.

Where by agreement of the parties cross-decrees were set-off against one another and satisfaction entered up, it was not competent to one of them, on getting the decree against him set aside on appeal, to take out execution of the decree that he held, as satisfaction had been entered up and there was no allegation that the adjustment had been obtained by mistake and contrary to the real intention of the parties, and that the conduct of the party who appealed had been *bonâ fide* and honest—*Gopeenath Roy* vs. *Dinobundho Nundy*, 3 B. L. R., App., 62; but in another case it was held that the procedure in this section should be followed in all cases even when one of the decrees has been appealed against, but should it be reversed in appeal the appellate decree will be executed, W. R., 1864 Mis., p. 1.

(*a*) Thus a decree for mesne profits, the amount of which has not been determined, cannot be set-off as a cross-decree.

In the case of *Ignatius De Silva* vs. *Ameen Shaha*, 16 W. R., C. R. 203 it was questioned whether the provisions of Act VIII, as to setting-off of decrees (section 209), applied to decrees passed under Act X of 1859.

Appeal.—An order disallowing the objection taken by the judgment-debtor to execution of a decree being taken out by a transferree is appealable—*Murlidhur* vs. *Parsotum Dass*, I. L. R., 2 Alla., 91.

Injunction.— A person who has been illegally placed on the record as legal representative can restrain the creditor from executing the decree, even though he did not appear to oppose the substitution—*Dhuronidhur Sen* vs. *Agra Bank*, 4 C. L. R., 434., I. L. R., 5 Cal., 86.

Cross-claims under same decree.

247. When two parties are entitled under the same decree to recover from each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party; but satisfaction for the smaller sum shall be entered on the decree.

When the amounts are equal, neither party shall take out execution, but satisfaction for each sum shall be entered on the decree.

This section applies to H. C. and M. S. C. C.

It is in accordance with the judgment of the Calcutta High Court, in the case of *Jaggo Mohun Bukshee* vs. *Surendro Nath Roy Chowdhry*, 13 W. R., 106.

Notice to shew cause why decree should not be executed

248. The Court shall issue a notice to the party against whom execution is applied for, requiring him to shew cause, within a period to be fixed by the Court, why the decree should not be executed against him,

(*a*) if more than one year has elapsed between the date of the decree and the application for its execution, or

(*b*) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made :

Proviso. Provided that no such notice shall be necessary

in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution, or

in consequence of the application being against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

Explanation.—In this section the phrase "the Court" means the Court by which the decree was passed, unless the decree has been sent to another Court for execution, in which case it means such other Court.

This section applies to H. C. and M. S. C. C.

The notice must be in writing (a form of notice is given in Sch. IV, No. 135), and served as provided for the service of summons (section 94), that is, as provided in sections 72—92, *ante*.

The date on which the notice was issued and served gives a first starting-point in the calculation of limitation for proceedings to execute a decree—Act XV, 1877, Sch. II, Art. 179, cl. 5.—*Koonjo Beharee Lall* vs. *Gridharee Lall*, 22 W. R., 484. The judgment-creditor should ask for the execution of the decree and not for the issue of a notice; it is the duty of the Court to issue the notice—*Gooroo Doss Auckholee* vs. *Modhoo Koondoo*, 6 W. R., Mis., 98.

Neglect to issue notice vitiates all subsequent proceedings; at least when the rights of third parties have not been affected—*Romeshurry Dossee* vs. *Durgadass Chatterjee*, 7 C. L. R., 85 ; I. L. R., 6 Cal., 103 ; *Imamunnissa* vs. *Liakut Hossein*, I. L. R., 3 Alla., 424.

A judgment-debtor who appears in proceedings taken in execution cannot object that no notice was served on him—*Grish Chunder Banerjea* vs. *Bhanoo Motee Chowdhrain*, 11 W. R., 329.

It not unfrequently happens that after issue of notice under section 248, nothing further is done towards enforcement of the decree, and on a subsequent application to enforce the decree, the judgment-debtor takes advantage of the lapse of time and, by denying due service of that notice, endeavours to put the decree-holder into a great difficulty to prove what may have escaped the recollection of the serving officer and those who may have witnessed the service. The Courts, however, have recognized and obviated this difficulty. In the case of *Bimola Soonduree Dassee* vs. *Kali Kishen Majoomdar*, 22 W. R., 5, the following judgment was delivered on this point:—" a notice under section 216 (now section 248) stands upon quite a different footing from a summons or other notice which a party is bound to serve, because, under that section, where an interval of more than one year has elapsed between the date of the decree and the application for its execution, 'the Court *shall* issue a notice to the party against whom execution may be applied for. Now in such a matter as this, the well-known maxim that all things must be presumed to have been done in accordance with rule (section 114, Evidence Act), will apply, especially, when a Court is dealing with its own process, as the Munsiff did in the present instance. We are entitled to presume that the Court had issued notice, and it clearly lay upon the defendants to prove to the satisfaction of the Court that the notice did not in fact issue. It is a very serious matter, that the plaintiff should be called upon, after the lapse of six or seven years from the date when he obtained a decree, not only to prove all those matters, which it is the business of the Court to look to, but also to prove *de novo* the case originally set up. The witnesses might all be dead, the documents might all disappear, and one might feel the utmost difficulty in proving a matter which he might have easily proved seven years before. We think, therefore, that the Court ought to be very cautious after the lapse of a considerable time in making any assumption in favour of the judgment-debtor, which he was not entitled to at the time when the judgment was passed against him." See also *Makoondonath Bhadoory* vs. *Shib Chunder Bhadoory*, 19 W. R., 102, following *Meer Lootf Ali* vs. *Aboo Bebee*, 15 W. R., 203, in which the report of the Nazir of due service of such a notice was held to be *primâ facie* evidence of the truth of the facts stated therein. In the latter case the Court remarked: " When a step towards execution of a decree is taken in a Court of Justice, it must be assumed to have been taken honestly and *bonâ fide*." The Court, in considering the fact that no furthur steps were taken towards execution after service of notice, stated;—" The inference that we draw from the circumstances which appear in this case is, that the decree-holder felt that it was useless to take any further steps against a man who had probably concealed himself."

Enforcement against the legal representative of a judgment-debtor.—Section 234, *ante*, describes the liability of such a person, which he can contest on service of the notice under this section.

Previous Application.—A previous application which is pending must be looked upon as a continuous proceeding until it is disposed of—*Shurut Chunder Sen* vs. *Abdool Khyr Mahomed*, 23 W. R., 327. A decree in a regular suit brought by a judgment-creditor against his judgment-debtor and a third party, under the provisions of section 246, Act VIII of 1859, was held not to be an order " passed on a previous application" within the meaning of Act VIII of 1859, section 216—*Peary Soondaree Debia* vs. *Bhuboo Soonduree Debia*, 23 W. R., 31.

An order for execution under this section or section 245, and made after notice to shew cause, has on the original side of the High Court, the same effect of reviving the judgment as the *sceri facias* formerly had—*Ashootosh Dutt* vs. *Doorga Churn Chutterje*, I. L. R., 6 Cal., 504.

Procedure after issue of notice.

249. If the person to whom notice is issued under the last preceding section does not appear, or does not shew cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

If he offers any objection to the enforcement of the decree, the Court shall consider such objection and pass such order as it thinks fit.

This section applies to H. C. and M. S. C. C.

The person against whom a notice under section 248 is issued and served is bound to appear and shew cause against it, if he has any valid ground for objecting to the execution against himself. He cannot afterwards come in and ask to have all proceedings subsequent by taken, including the sale of certain properties, set aside as nullities, for the clearer the

ground on which the acts complained of are said to be bad and erroneous, the easier his course was to come before the Court and induce it to stay its hands. Under these circumstances the High Court refused to interfere in exercise of its extraordinary power under section 15, of the Charter Act—*Cochrane* vs *Maharanee Brijo Soonduree Dassee*, 23 W. R., 310; 14 B. L. R., 330. A petition of objection shewing cause under this section need not be verified—*Sant Gopal Chunder* vs. *Maharaja Juggut Indur Bunwaree Gobind*, 8 W. R., 200; 4 Wy., 91.

When a petition of objection is presented under this section the Judge is bound, whether a day for hearing has been fixed or not, to fix a day for consideration of it; and (even if the petitioner is not present, either personally or by a pleader,) to consider those objections, and to pass such orders as may be just and proper. for it might be that the ground of objection raised would be of such a nature as that the Judge might, *primâ facie*, and without going further into the case, see season for not proceeding with the execution—*Rajbullub Shaha* vs. *Ram Sudoy Ghose*, 14 W.R., 155; 5 B. L. R, App., 65.

Warrant when to issue.

250. When the preliminary measures (if any) required by the foregoing provisions have been taken, the Court, unless it sees cause to the contrary, shall issue its warrant for the execution of the decree.

This section applies to H. C. and M. S. C. C.

Where the previous warrant has been unfructuous without any fault on the part of the judgment-creditor, the Court should not refuse to issue a warrant for the attachment of the person of the debtor—*Seton* vs. *Bijohn*, 8 B. L. R., 255. See also section 230, *ante*.

Date, signature, seal and delivery.

251. Such warrant shall be dated the day on which it is issued, signed by the Judge or such officer as the Court appoints in this behalf, sealed with the seal of the Court, and delivered to the proper officer to be executed.

And a day shall be specified in such warrant on or before which it must be executed, and the proper officer shall endorse thereon the day and manner in which it was executed, or, if it was not executed, the reason why it was not executed, and shall return it with such endorsement to the Court from which it issued.

This section applies to H. C. and M. S. C. C.

The receipt of a Chowkeedar or the report of a Nazir executing a process in execution of a decree are not evidence *per se*, but must be proved like other documentary evidence—*Okhoy Chunder Dutt* vs. *Erskine & Co.*, 3 W. R., 11 Mis.; *Sha Koondun Lall* vs. *Noor Ali*, 10 W. R., 3. See however 22 W. R., 5.

If the Court be a Court to which the decree has been sent for execution, it "shall certify to the Court which passed it, the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure"—Section 223, *ante*.

Decree against representative of deceased for money to be paid out of deceased's property.

252. If the decree be against a party as the legal representative of a deceased person, and the decree be for money to be paid out of the property of the deceased, it may be executed by the attachment and sale of any such property.

If no such property remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed

against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

This section applies to H. C. and M. S. C. C.

This section primarily refers to a party who has been substituted before decree for the original debtor, but it is equally applicable to a person who has been made a party in the execution proceedings—see section 647, *infra*, and *Syud Jaffar Hossein* vs. *Hingun Jan*, 8 W. R., 161; but where a suit was brought and a decree obtained against a man who had died before the filing of the plaint, no execution was allowed to issue against his legal representatives—Petition of *Girindronath Tagore*, 14 B. L. R., 334, *note*. The Court will not give a decree against parties as representatives of a deceased debtor where the suit is brought not on the ground that the defendants are the legal representatives, but on the ground that they have property of the deceased in their possession—*Heera Lall Mookerjea* vs. *Digumburee Kuloonee*, 14 W. R., 431; 6 B. L. R. App., 100.

Legal Representative.—This includes the heir of an intestate—*Greender Chunder Ghose* vs. *Mackintosh*, 4 C. L. R., 210.

It is necessary that the party against whom the decree is passed should be the legal representative who has succeeded to the property of the deceased debtor. Thus where a decree was given against one of two separate Hindu brothers as representative of the other who had died leaving a widow, it was held that execution could not be had against the property of the deceased in the hands of the widow, on the ground that the widow and not the brother was the legal representative—*Natha Hari* vs. *Jamni*, 8 Bom., 37. And where a decree was given against the heir (the widow) of a deceased member of a joint mitakshara family as his representative, it was held that execution could not be had under it against the property of the deceased, which has passed to the other members of the family by survivorship—*Sadaburt Prasad Sahu* vs. *Poolbash Kooer*, 3 B. L. R., 31. Full Bench. [In the case just cited Sir Barnes Peacock stated the meaning of the first paragraph of the present section to be "that where the decree is against a representative of a deceased person, and the decree is for money to be paid out of the property of the deceased, it must be paid out of such of the property of the deceased person as passed to the representative."] But see in connection with this case, *Suraj Bunsi Koer* vs. *Sheo Pershad Singh*, I. L. R., 5 Cal., 148; So where a Mahomedan died leaving a widow and two daughters and a decree was obtained against one of the daughters as representative of her deceased father for a debt due partly by herself and partly by her father, it was held that a sale under that decree carried only the share of the daughter against whom the decree was passed—*Hendry* vs. *Mutty Lall Dhur*, I. L R. 2 Cal., 395. So also where a decree by consent was obtained against some of the heirs of a Mahomedan for a debt due by him, the decree only bound those who were parties to it—*Assamathem Nissa* vs. *Roy Luchmiput Singh*, I. L. R., 4 Cal., 143; *Shaikh Abdulla* vs. *Haji Abdulla*, I. L. R., 5 Bom., 8; see however, *Motejan* vs. *Mesrigan*, 10 C. L. R., 347, I. L. R., 8 Cal., 370. There are, however, some cases in which a decree passed against a representative for a debt due by the deceased may be executed against property which has passed to some one other than the representative who is sued, but is in the latter's possession. Thus where a Hindu died, indebted on a bond, leaving a widow and a minor son, and a decree was obtained on the bond against the widow, plaintiff having alleged that she was the guardian of the minor son, as was the case, it was held that a sale, in execution of this decree, of the right, title and interest of the "debtor" carried the interest of the deceased, and not that of the widow, which was *nil*—*Ishan Chunder Mitter* vs. *Buksh Ali Soudagur*, Marsh., 614 W. R. (F. B.), 119, explained in *Baijun Dobey* vs. *Brij Bookun*, I. L. R., 1 Cal., 133; L. R., 2 Ind. App., 275. But where the decree is a personal decree, the purchaser can not go behind it and the sale proceedings to show that the sale was not confined to her limited interest—*Radha Mohun Mundul* vs. *Soshi Bhoosun*, 3 C. L. R., 530, and where the decree did not describe the debt as that of the father, but simply that defendant was to pay it and the widow was described in the plaint as "widow of Anund Mohun Surma Roy deceased, and mother of Denobundo and Bepin Chunder Roy minors" it was held that the execution sale did not pass the minor's interest or estop the widow as their heir from obtaining the property—*Alukmoni Dabi* vs. *Banimadhab Chuckerbutty*, 3 C. L. R., 473. Where a widow was sued as guardian of her minor son, for a debt due by her husband, and a decree obtained against her as representative in possession and ostensible owner of her husband's property, it was held that a sale under that decree, nominally of the widow's interest, carried the interest of the deceased, the sale certificate referring to the decree—*Court of Wards* vs. *Maharajah Coomar Ramaput Singh*, 11 Moore, 605; 10 B. L. R., 291; 17 W. R., 459; but where a Hindu defendant died leaving a widow and a minor son, and the suit was continued against the widow, not as guardian of her son, and after the widow's death, against sister of the defendant, who was not appointed guardian *ad letern*, to the the minor, or administrator of his estate, it was held that the minor was not bound by the decree—*Jatha Naik* vs. *Venktapa*, I. L. R., 5 Bom., 14.

Where in Bengal, the heir is a widow, the test to be applied in determining whether a decree against her binds, the reversioners, is whether it was brought against the widow upon a cause of action personal to herself, or one which affects

the estate of the reversioner—*Jotendra Mohun Tagore* vs. *Jogul Kishore*, I. L. R., 7 Cal., 357; *Gadgeppa* vs. *Apaji*, I. L. R., 3 Bom., 237; *Ramasami* vs. *Mudaliar*, I. L. R., 4 Mad., 375; and also *Ram Coomar Mitter* vs. *Ichamoyi Dasi*, I. L. R., 6 Cal., 36. And the question must be decided upon the decree and the record of the sale proceedings—*Radha Mohun Mundul* vs. *Soshi Bhoosun*, 3 C. L. R., 530.

A sale of the widow's interest in the property of a deceased Mahomedan, under a decree obtained against her for a debt of her husband, the sale notification referring to the decree, was held to carry the interest of the deceased—*Mussamut Nuzerun* vs. *Moulvie Ameerooddeen*, 24 W. R., 3; and where a decree was obtained against two of the three sons of a deceased Hindu for a debt due by him it was held, as against the third son, that what was sold was *primâ facie* the interest of the deceased—*Lalla Seeta Ram* vs. *Ram Buksh Thakoor*, 24 W. R., 383, and a sale under a decree which was passed against the daughter-in-law of a deceased Hindu defendant who had died before decree, of the right, title and interest of the daughter-in-law, was held to have passed the interest of the deceased—*Hulkhory Lall* vs. *Sheo Churn Lall*, 24 W. R., 109. The three cases last cited profess to follow that of *Ishan Chunder Mitter* in Marshall, 614, but whether they do so is very doubtful; they are certainly opposed to the cases previously cited in this note, and to *Ramasami Chetti* vs. *Saluckai Tevar*, 8 Mad., 186, where it was held that proceedings against the widow alone of a deceased mortgagor in execution of a decree obtained against the mortgagor (the widow having merely a right to maintenance) were not effectual to pass any right or interest in the property mortgaged to the purchaser at an execution sale. And where a decree was obtained against a Mahomedan widow for a debt due by her husband who had died leaving a widow and a minor daughter, it was held (though the point was not directly before the Court) that the daughter was not bound by the decree—*Hamir Singh* vs. *Mussamut Zakai*, I. L. R., 1 Alla., 57. See also, on this point, *Sham Coomar Roy* vs. *Juttun Bibee*, 14 W. R., 448; *Rajah Raj Kristo Singh* vs. *Bungshee Mohun Bibee*, 14 W. R., 448; note; *Hukum Bibee* vs. *Gowhur Ali*, 5 Wy., 27; and the cases in 15 B. L. R., 134, *et notis*.

A person taking possession of the estate of a deceased Hindu, leaving a will of which probate has not been granted, may be treated as a legal representative until probate is taken—*Prosunno Chunder Buttacharjea* vs. *Kristo Chytunno Pal*, 1. L. R., 4 Cal., 342. But this case might have been decided on the principle laid down in 1 Moore, 442, 444.

Where a suit is brought under this section against the representative of a deceased person, the defendant should be described as stated in section 50, *ante*, and the plaint should contain an allegation that he is the representative of such deceased person, and that the suit is brought against him as defendant on that account, and if the particulars in the plaint are made out, a decree will be passed against him—*Ameeroonissa Khatoon* vs. *Meer Mahomed Chowdhry*, 20 W. R., 280. The decree must in the first instance be executed or be attempted to be executed against the property of the deceased "in the hands of the representative—*Shurfun Bibee* vs. *Collector of Sarun*, 10 W. R., 199. The private property of the representative cannot be attached and sold until it is shewn in the execution proceedings that he has received assets of the deceased, of which he fails to prove a proper disposition—*Wahed Ali* vs. *Mussamut Jumaee*, 18 W. R., 185; *Indro Narain* vs. *Kristo Chunder*, 14 W. R., 362; *Ameroonissa Khatoon* vs. *Meer Mahomed Chowdhry*, 20 W. R., 280; *Mooktakeshee Debia* vs *Wooma Churn Bhuttacherjee*, 12 W. R., 233. If he is proved to have received or if he has admitted assets, which he may do by implication (*e. g.*, by asking time to pay the amount of the decree—*Ghotta Sahyee* vs. *Gour Monee Dassee*, 21 W. R., 117) and fails to account for their value, execution may be had by attachment and sale, or by imprisonment, as in the case of any ordinary debtor—*Wahed Ali* vs. *Mussamut Jumaee*, 18 W. R., 185; *Maharajah Mahatab Chunder Bahadoor* vs. *Munmohinee Dossee*, 12 W. R., 517, whether the debt for which the decree was passed became due before or after the death of the debtor—*Mooktakeshee Debia* vs. *Ooma Churn Bhuttacharjee*, 12 W. R., 233.

The legal representative of a deceased judgment-debtor is responsible, not for the property which came into his hands in such capacity, but for its value. He can sell any such property to a third party, and a creditor cannot follow it into the hands of one who has purchased it in good faith, and for valuable consideration. The decree-holder can only make the legal representative personally liable for the debt to the extent of the assets he received—*Unno Poorna Dassee* vs. *Ganga Narain Pal*, 2 W. R., 296. He is bound only to pay the full value of the assets which he received in that capacity, and if he has properly done so, even though he may still hold property which originally belonged to the deceased judgment-debtor, the decree can no longer be executed. If a decree be passed against a person in his representative capacity, and he makes payments in satisfaction thereof, it is a legal and reasonable presumption, until the contrary is proved, that such payments were made by him in that capacity in which alone he was liable to make them, *i.e.*, his capacity as representative—*Ram Gholam Dobay* vs. *Ayma Begum*, 12 W. R., 177. See also *Syud Jaffir Hosein* vs. *Hingum Jan*, 8 W. R., 161; and an anonymous case in 1 Agra (F. B.), 72.

Certain decrees against a deceased judgment-debtor are, however, only personal decrees. For instance, a decree to give accounts within a certain time, with an alternative in the shape of the payment of a sum of money in the event of refusal or neglect to do so, is a personal decree; and when the judgment-debtor has survived the period during which the amount was to be given, and no proceedings are taken against him either then or subsequently, the decree cannot be executed against his representative—*Biddoomookhee Dassee* vs. *Raja Bejoy Keshub Roy*, 12 W. R., 495.

If no such property can be found.—These words confine the section to property remaining in the possession of the legal representative, and the creditor must follow property improperly alienated in a regular suit—*Greendar Chunder Ghose* vs. *Mackintosh*, 4 C. L. R., 210. Ghatwali lands are not liable to be seized in execution of a decree against the father as property by descent in the hands of his son—*Rajah Nilmoni Singh* vs. *Bakra Nath Singh*, L. R., 9 Ind. App., 104.

Section 282 of the Indian Succession Act does not, in cases to which that Act applies, prevent a person who has obtained a decree under this section from having the whole of his decree satisfied out of the assets of the deceased, as far as they go, to the exclusion of other parties who have claims against it admitted to be correct, but who have not obtained decrees of Court—*Nil. Komul Shaw* vs. *Reed*, 17 W. R., 513.

Under section 11, Act XXIII of 1861 an appeal lay from orders passed against a representative under section 203, Act VIII of 1859 (the section corresponding to the present one)—*Ameeronissa Khatoon* vs. *Meer Mahomed Hossain*, 20 W. R., 281. See section 588.

Decree against surety.

253. Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant:

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.

This section applies to H. C. and M. S. C. C.

This section applies to arrest and attachment before judgment, which are regulated by sections 483-490, *post*, and to cases where a plaintiff may be called upon to give security for costs—See *Ram Coomar Coondoo* vs. *Chunder Canto Mookerjee*, L. R., 4 Ind. App., 23; I.L.R., 2 Cal., 233; and according to the Allahabad High Court extends to all suretyships for the due performance of appellate decree, and decrees of the Judicial Committee of the Privy Council—*Bans Bahadur Singh* vs. *Mogla Begum*, I. L. R., 2 Alla., 604; see also *Chunder Kanto Mookerjee* vs. *Ram Coomar Coondoo*, C. L. R., 505.

Act VIII of 1859, section 204, was held to apply to cases where security was demanded and taken under section 342 of that Act for the purpose of securing to a respondent his costs—*Chatterdhary Lall* vs. *Ram Belashee Kooer*, 1 C. L. R., 347, and cases there cited: but the present section only refers to persons who have become sureties before the passing of a decree in an original suit—*Chundun Kuar* vs. *Tirkha Ram*, I. L. R., 3 Alla., 809. It was also held under Act VIII that a surety, whether he became such before or after the original decree, was a party to the suit within the meaning of section 11, Act XXIII of 1861 (section 244, *ante*), and that an appeal would lie from an order passed against him in execution of the decree—*Akhut Ramana* vs. *Ahmed Yousaffji*, 7 B. L. R., 81; 15 W. R., 538; *Bhikaji Vithal Ambekar, Ex-parte*, 4 Bom., 119; *Ghoree Lal Jha* vs. *Sheo Narain Singh*, 8 W. R., 24.

This section gives an additional not an exclusive remedy against the surety, and does not prevent the decree-holder from bringing a suit on the surety bond to enforce the contract entered into—*Abdul Kadir* vs. *Baboo Hurree Mohun*, 6 Alla., 261.

Decree.—The security must have been taken for the performance of the decree. And where the decree was varied by a private arrangement between the parties, and security was given to carry out the new arrangement, it was held that the surety was not liable under section 204, Act VIII, 1859—*Chundee Deen* vs. *Hussun Ali*, 3 Alla., 88.

Decree for money.

254. Every decree or order directing a party to pay money, as compensation or costs, or as the alternative to some other relief granted by the decree or order, or otherwise, may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property in manner hereinafter provided, or by both.

This section applies to H. C. and M. S. C. C.

A Court should, as a rule, execute the decree as applied for by the decree-holders (see section 244, *ante* and note,) but it may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor—section 230, para. 2. It should not issue a warrant for the arrest of a *purda* lady, unless satisfied by the decree-holder that he has no other means of enforcing the decree—*Moharanee Udhee Ranee Narain Coomaree* vs. *Sreemutty Buroda Soondaree Dabee*, 10 W. R., 21; 1 B. L. R., 21.

For costs see sections 218—222 and notes thereunder.

Ordering a party to pay money.—A decree for maintenance to be paid at a certain rate per month stands on the same footing as a decree ordering payment by instalments, and may be executed from time to time as the instalments fall due —*Peareenath Brohmo* vs. *Juggessuree*, 15 W. R., 128.

Alternative to some other relief.—That is, if the decree be for the delivery of moveable property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had—section 208.

"Otherwise."—This would include interest on the amount of the decree or on the costs—see section 209. The Court executing a decree is bound to execute it as it stands and not to adjudge interest or costs where the decree is silent on these points—*Forester* vs. *Secretary of State*, L. R., 4 Ind. App., 137. See same case at p. 146, regarding payment of interest on money paid under an erroneous order of the first Court, the refund of which, in reversal of that order, was ordered by the Appellate Court; and see *Rodger* vs. *Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465, 475. The Privy Council held in these cases that where money had been erroneously paid, interest should be allowed in the order of refund, so that the parties might be placed in the same position that they were before the erroneous order, but that in granting costs it was discretional with a Court to allow interest.

Imprisonment.—As to the power of the High Court to commit for contempt, see *Martin* vs. *Lawrence*, I. L. R., 4 Cal., 655.

A suit to recover damages on account of injuires caused by an arrest in accordance with a decree of a competent Court, can only be maintained when the original suit has been finally decided in favor of the plaintiff, when the arrest was made without reasonable or probable cause, and the injury he has suffered cannot be compensated by costs—*Rajchunder Roy* vs. *Shama Soondari Debi*, I. L. R., 4 Cal., 583.

Decree for mesne profits or other matter, amount of which to be subsequently ascertained.

255. If the decree be for mesne profits or any other matter the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.

This section applies to H. C. and M. S. C. C.

It is in accordance with the judgment in *Sharoda Moyee Burmonee* vs. *Woma Moyee Burmonee*, 8 W. R., 9.

In a suit for damages for mesne-profits against several defendants each of whom has taken possession of a distinct portion of a share, the damages may be apportioned amongst them; otherwise where the defendants have taken joint possession—*Krishna Mohun Basak* vs. *Kunjo Behari Basak*, 9 C. L. R., 1.

Execution for mesne-profits should not be allowed to issue against a *pro formad* defendant—*Manajan* vs. *Kashi Nath Panday*, 5 C. L. R., 305.

The actual occupiers, as well as the lessors, will be held liable for mesne-profits—*Mudun Mohun Singh* vs. *Ram Dass Chuckerbutty*, 6 C. L. R., 357.

Power to direct immediate execution for decree for money not exceeding Rs. 1,000.

256. When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court, or against his moveable property within the same limits.

This section applies to H. C. and M. S. C. C.

It should be noted that under this section application for immediate execution of the decree passed cannot issue *simultaneously* against both the person and property of the judgment-debtor, nor against any property, except his moveable property within the local limits of the jurisdiction of the particular Court.

Tiled huts are not moveable property, and cannot be seized in execution under this section—*Nattoo Meah* vs. *Nund Ranee*, 17 W. R., 309; 8 B. L. R., 508.

When a debtor attended at the Small Cause Court as a witness under a subpœna in a suit which was fixed for trial on that day, it was held that he was privileged from arrest while going to the Court, staying there, and returning from it—In the matter of *Omritolall Dey*, I. L. R., 1 Cal., 78; and this is the general rule. But where a warrant is directed against the person under this section, the arrest may take place at any time and the debtor can claim no privilege—*De Penning* vs. *Debendronath Moitro*, 9 W. R., 549.

Modes of paying money under decree.

257. All money payable under a decree shall be paid as follows (namely)—

(*a*) into the Court whose duty it is to execute the decree; or

(*b*) out of Court to the decree-holder; or

(*c*) otherwise as the Court which made the decree directs.

This section applies to H. C. and M. S. C. C.

Part payment into Court does not keep the decree alive—*Kally Prosunno Hazra* vs. *Heera Lall*, 1 Shome, 13.

Agreement to give time to judgment-debtor.

257A. Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

Agreement for satisfaction of judgment-debt.

Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.

Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt; and the surplus, if any, shall be recoverable by the judgment-debtor.

Payment to decree-holder.

258. If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in section 257 A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree.

The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to shew cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after due service of such notice, the decree-holder fails to appear on the day fixed, or having appeared fails to shew cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

No such payment or adjustment shall be recognised by any Court unless it has been certified as aforesaid.

This section applies to H. C. and M. S. C. C.

This section does not govern payments made in execution of decrees passed under Act X, 1859, in the Revenue Courts—*Ram Chunder Roy* vs. *Ram Churn Bukshee*, 9 W. R., 372; *Rajah Protap Chunder Singh* vs. *Kanaye Lal Doss*, 3 W. R., Act X, 7. See also *Gopal Chandra Dey* vs. *Pemu Bibi*, 1 B. L. R., 76. It is not limited to money decrees—*Baba Baba Mohamed* vs. *Webb*, I. L. R., 6 Cal., 786. In execution of a decree, by which the decree-holder was declared to be entitled to a specific share of land to be allotted on partition, it was objected by the judgment-debtor that the decree-holder had already obtained possession and had granted him a lease of the land covered by the decree. *Held*, that this section prevented the Court from entertaining the objection—*Bala Mahomed* vs. *Webb*, 8 C. L. R., 36.

Under a decree.—This section presupposes that there is a decree in existence. A sued B and obtained a decree which was reversed in the first Appellate Court. B was about to file a special appeal when A compromised the case and gave up the property. It was held that the compromise, having been effected after the decree in favour of B had been reversed, need not have been certified to the Court—*Hari Sadashiv Dikshit* vs. *Bapu Balvant*, 5 Bom., 78.

By section 210, *ante*, the Court may, within six months from the date of passing of the decree (Act XV, 1877, Art. 75), and with the consent of parties, direct that the amount payable under a decree for the payment of money be paid by instalments and the modified decree may be executed in the usual manner; but if the parties

enter into any other compromise, so as to extinguish the decretal demand, the agreement cannot be enforced in execution, but only by a regular suit—*Pran Kristo Ghose* vs. *Sujeeun Singh*, 18 W. R., 279; unless it has been filed, and the judgment-debtor has, by treating it as a decree for a long time, estopped himself from raising any objection to its execution—*Dinonath Sen* vs. *Guru Churn Pal*, 14 B. L. R., 287; and cases cited.

Instalment decree.—Plaintiff obtained a decree for a sum of money payable by instalments, the whole amount of the decree to be recovered if any one instalment should not be paid as it came due. The earliest instalment was due more than three years before he applied for execution. It was held that he could certify to the Court and prove that the defendant had paid the first instalment out of Court, and that his application was not barred—*Fakir Chand Bose* vs. *Madan Mohan Ghose*, 4 B. L. R., 130; *Juggut Mohinee Dossee* vs. *Madhub Chunder Kur*, 15 W. R., 66.

In the case of a decree payable by instalments as the command of the Judge prescribes a term for the performance of the several parts of the order, it is to be construed as becoming a judgment for the purposes of limitation, as to each instalment only on the day when the payment is made—*Sakharam Dikshit* vs. *Ganesh Sathe*, I. L. R., 3 Bom., 193; *Kanchan Singh* vs. *Sheo Pershad*, I. L. R., 2 Alla., 291.

Into Court.—Payments into Court were not confined under section 206, Act VIII, 1859, to such payments as were made into the Court itself; but were interpreted to cover payments to the officer of the Court under the authority of the Court's process. Thus where a warrant issued to an officer, directing him to arrest the debtor, unless he paid a certain amount, it was held that the debtor was on payment entitled to the protection of that section—*Bidhoo Beebee* vs. *Keshub Chunder Baboo*, 9 W. R., 462; a similar case would now be dealt with under section 257 (*c*)—*Mirza Mahomed Aga Ali Khan Bahadoor* vs. *The widow of Balmakund*, L. R., 3 Ind. App., 248. When money is paid into Court by a judgment-debtor in satisfaction of the decree, the Court is bound to pay it over on the application of the decree-holder, and also to inform the judgment-debtor, when such information is required, what amount is still due under the decree—*Luchmun Pershad* vs. *Sreeram*, 21 W. R., 271; but if the payment is made by the debtor to prevent his arrest, it is not a voluntary payment, and he is entitled to be heard on whatever objections on law and fact he may desire to make, before the money is paid out. He is not restricted to the objections he may have stated when making the payment—*Prosunno Nath Mookerjea* vs. *Binode Ram Sein*, 13 W. R., 29; 4 B. L. R., App., 25.

Where the creditor is dead his ordinary legal heirs should get the money. A decree-holder died leaving a widow, a son's widow claiming power to adopt, a person claiming under a died of gift. *Held* the money should be paid to the widow and the other parties left to regular suit.—*Pearmonee*, Petitioner, S. D. Sum. Decs., Sept. 27, 1836.

Decree-holders shall certify.—Payments or adjustments made out of Court must be, to give them validity, certified by all the decree-holders, though if a payment is certified by the principal decree-holders, the other decree-holders should not be allowed to issue execution unless they should shew good cause, namely, that they did not know of the alleged payment, and it made, that it was to defraud them and that the judgment-debtor was privy to the fraud—*Ranee Nyna Kooer* vs. *Doolee Chund*, 22 W. R., 77; and so strongly has this doctrine been adhered to by the Courts that when the judgment-debtor stated that he had paid the creditor, who gave him a letter to his vakil to certify, and petitioned that the creditior might be called on to answer, his application was refused—*Thakoor Lall Misree* vs. *Kanye Lal Tewaree*, 7 W. R., 510; so where the decree-holder having realized a portion of his debt gave the judgment-debtor a release, but without consideration, and a letter directing his vakil to certify, it was held that the release being without consideration had no legal effect; that the direction to the vakil to certify was not equivalent to certifying, and that there was no bar to execution—*Bhoobun Mohun Banerjee* vs. *Sadhoo Churn Sircar*, 15 W. R., O. C., 5; 6 Ben., 339. So an uncertified sale of the decree, in execution under a Revenue Court decree, where the purchaser was not put on the record, did not bar execution by the decree-holder—*Barut Chunder Roy* vs. *Nawab Nazir Ali Khan*, 10 W. R., 354; but see *Bhya Bhoopnath Sahee* vs. *Kunwan*, 7 W. R., 134; though where an execution-creditor entered into a compromise with his debtor and thereupon, but without certifying the terms of the compromise, petitioned for the release of the debtor, and he was so released, the High Court at Bombay refused to allow execution without an enquiry into the facts connected with the release—*Chango* valad *Dudha Mahajan* vs. *Kaluram Narayandas*, 4 Bom., 120. See also *Krisnaji Kesava Pundit* vs. *Mabasaya Tukker*, 7 Mad., 387.

The decree-holder is not subject to any limitation, and may certify after any lapse of time—*Fakir Chand Bose* vs. *Madan Mohan Ghose*, 4 B. L. R., 130; *Bhubuneswari Debi* vs. *Dinonath Sandyal*, 2 B. L. R., 320; 11 W. R., 232. The ordinary way of certifiing a payment or adjustment is by petition made by the decree-holder to the Court—*Saadoollah Sheikh* vs *Kalee Churn*, 12 W. R., 358; but it can also be certified on an application to execute the decree—see section 235 (*e*)

Remedies of the debtor.—If the decree-holder does not certify, the debtor may apply within 20 days to compel him to do so, and the Court, after hearing the parties, and those persons who are acquainted with the facts of the case, may pass such orders as may seem proper—*Pareechut* vs. *Ragho Goordeo*, 2 Alla., 48; *Chango* valad *Mahajan* vs. *Kaluram Naragands*, 4 Bom., 120; *Rajendronath Roy Bahadoor* vs. *Chunnoo Mal*, I. L. R., 5 Cal., 448, but an adjustment of a decree not certified by either party within the time limited by law (see Limitation Act, Sch. II, Act 161) can not be recognized as a bar to execution—*Chedumbara Pellai* vs. *Ratnaammal*, I. L. R., 3 Mad., 113 If the debtor fails he can bring a separate suit to recover compensation for the money or other property given to the judgment-creditor—*Meer Mahomed Kazem Johurry* vs. *Khetoo Beebee*, 20 W. R., 150; *Chukroo Singh* vs. *Jowahir Singh*, 19 W. R., 152; *Guni Khan* vs. *Koonjoo Behari Sein*, 3 C. L. R., 414; (otherwise in Madras—*Arunachella Pillai* vs. *Appavu Pillai*, 3 Mad., 188. The judgment in this case seems to have been delivered without any argument at the bar, and it has been expressly dissented from by a Full Bench of the Calcutta High Court, in the case of *Goono Monee Dossia* vs. *Pran Kishore Dossee* 13 W. R., 69; 5 B. L. R., 223); *Motee Lall Mookerjea* vs. *Kandhai Lall*, 1 Alla., 237, *Gulowad Chandabhai* vs. *Rahimtulla Jamalbhai*, 4 Bom., A. C. 76; but see *Patankar* vs. *Devbi*, I. L. R., 6 Bom., 146; or he may sue for an injunction restraining the creditor from execution—*Nubo Kishen Mookerjee* vs. *Debnath Roy Chowdhry*, 22 W. R., 149 *Dhurinidhur Sen* vs. *Agra Bank*, 4 C. L. R., 434; Act I, 1877, section 54; or if the decree-holder has agreed not to execute, for specific performance of the contract—*Nujeem Mullick* vs. *Erfan Mollah*, 22 W. R., 298; or for damages in a Small Cause Court—*Soojun Mundul* vs. *Woozeer Mundul*, 6 W. R., Ref., 20.

If the compromise was induced by fraud the Court can set it aside and deal with the decree as if it had no existence—*Paranghe* vs. *Kanede*, I. L. R., 7 Bom., 148. The Court to which a decree has been sent for execution can give relief—*Rajendranath Roy* vs. *Chunnoo Mal*, I. L. R., 5 Cal., 448.

Quaere.—Whether this section bars a suit by the judgment-debtor to recover the money so paid—*Daulata* vs. *Ganesh Shastri*, I. L. R., 4 Bom., 295; *Sita Ram* vs. *Mahipal*, I. L. R., 3 Alla., 533; *Shadi* vs. *Ganga Sahai*, I. L. R., 3 Alla., 538; but see *Palankar* vs. *Devji*, I. L. R., 6 Bom., 146.

Decrees for specific moveables or recovery of wives.

259. If the decree be for any specific moveable, or for any share in a specific moveable, or for the recovery of a wife, it may be enforced by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the imprisonment of the judgment-debtor, or by attaching his property or by both imprisonment and attachment if necessary.

When any attachment under this section has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed under section 208, such amount, and, in other cases, such compensation, as it thinks fit, and shall pay the balance, if any, to the judgment-debtor on his application.

If the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or if, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease to exist.

This section applies to H. C., and with the exception of the words "or for the recovery of a wife," to M. S. C. C.

The Specific Relief Act (I of 1877), section 11, states in what cases a decree may be passed for the delivery of a "specific moveable."

A decree was given for certain immoveable and moveable properties specified in the schedule annexed to the plaint, and an order was passed that the Civil Court Ameen should ascertain the extent of the moveable property, should give possession of such moveable property specified in the decree as he could find, and further that he should inquire into the nature, amount, and value of such moveables as he could not find. In appeal against this order the Calcutta High Court remarked that when the extent and value of moveable property are not precisely ascertained before decree, it is obviously necessary to ascertain what the value of the moveables not delivered to the plaintiff is, in order that the Court may make, if necessary, a sufficient and not an excessive order by way of imprisonment of the party, or by attachment of his property in case of non-delivery. The Court added—"We must assume that the order of the Court below was made for a lawful purpose, and that the Court, on being informed by its officer, will make such further order as to it may seem just" —*Bhoobun Mohinee Debia* vs. *Gobind Chunder Majoomdar*, 19 W. R., 82.

Recovery of a wife.—See *Yamunabhai* vs. *Narayan Moreshvar Pendse*, I. L. R., 1 Bom., 164.

Decree for specific performance or restitution of conjugal rights

260. When the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights or for the performance of or abstention from any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both.

When any attachment under this section has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, the property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and may pay the balance, if any, to the judgment-debtor on his application.

If the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or if, at the end of one year from the date of the attachment, no application to have the property sold has been made and granted, the attachment shall cease to exist.

This section applies to H. C.

This section meets the objections raised in the case of *Gatha Ram Mistree* vs. *Moohita Koochin Atteah Domoonee*, 23 W. R., 179: 14 B. L. R., 298; and *Yamunabhai* vs. *Narayan Moreshvar Pendse*, I. L. R., 1 Bom., 164, regarding the enforcement of a decree for restitution of conjugal rights.

A Court may refuse to pass a decree for the restitution of a child-wife to her husband, unless he can prove that she has attained puberty—*Suntosh Ram Doss* vs. *Gera Pattuck*, 23 W. R., 22. A woman who had been directed by a decree to refrain from preventing her daughter returning to her husband permitted the daughter who was of age to reside with her. *Held*, this was not such an interference with her daughter's return as would justify proceedings under this section—*Ajn si Kuar* vs. *Suraj Prosad*, I. L. R., 1 Alla., 501.

A decree was passed directing that "the defendants do, within six weeks after service on them of this decree, remove the obstruction and re-open the pathway, &c." After several unsuccessful attempts towards enforcing this decree the decree-holder obtained an order from the Court directing the Ameen to execute the decree by removing the obstruction. On appeal, this order was set aside as contrary to law—execution being enforcable only in the

manner prescribed by this section—see *Bhoobun Mohun Mundul* vs. *Nobin Chunder Bullub*, 18 W. R., 282; and the same procedure should be followed in executing a decree directing the removal of a building—See *Holloway* vs. *Mahomed Ali*, 16 W. R., 140; *Doorga Lall* vs. *Lalla Hulwant Sahoy*, 25 W. R., 306; *Protap Chunder Das* vs. *Payri Chowdhrain*, 9 C. L. R., 453; I. L. R., 8 Cal., 174.

By a decree it was directed that the plaintiff and defendant should manage certain property jointly, and that the names of both should appear in all papers connected with such property. *Held*, that the Court had, under this section, jurisdiction to order attachment of the defendant's property for disobeying the decree—*Gouri Prosad Moitra* vs. *Bholanath Sanyal*, 8 C. L. R., 487.

Section 19 of the Specific Relief Act (I of 1877) provides that, "Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance. If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract shall also be made to the plaintiff, it shall award him such compensation accordingly. Compensation awarded under this section may be assessed in such manner as the Court may direct."

Decree for execution of conveyances or endorsement of negotiable instruments.

261. If the decree be for the execution of a conveyance, or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement in accordance with the terms of the decree, and deliver the same to the Court.

The Court shall thereupon cause the draft to be served on the judgment-debtor in manner hereinbefore provided for serving a summons, together with a notice in writing stating that his objections, if any, thereto shall be made within such time (mentioning it) as the Court fixes in this behalf.

The decree-holder may also tender a duplicate of the draft to the Court for execution, upon the proper stamp-paper if a stamp is required by law.

On proof of such service, the Court, or such officer as it appoints in this behalf, shall execute the duplicate so tendered, or may, if necessary, alter the same, so as to bring it into accordance with the terms of the decree, and execute the duplicate so altered:

Provided that, if any party object to the draft so served as aforesaid, his objections shall, within the time so fixed, be stated in writing and argued before the Court, and the Court shall thereupon pass such order as it thinks fit, and execute, or alter and execute, the duplicate in accordance therewith.

Objections to draft-conveyances or draft-endorsements can be made the subject of appeal—section 583 (*l.*)

Where registration of conveyances of immoveable property are by law compulsory, it will probably be necessary to have any such conveyance executed by the Court, duly registered under the Registration Act (III, 1877.)

Form and effect of execution of conveyance by Court.

262. The execution of a conveyance, or the endorsement of a negotiable instrument, by the Court under the last preceding section may be in the following form: "*C. D.*, Judge of the Court of (*or as the case may be*), for *A. B.*, in a suit by *E. F.*, against *A. B.*," or in such other form as the High Court may from time to time prescribe, and shall have the same effect as the execution of the conveyance or endorsement of the instrument by the party ordered to execute or endorse the same.

This section applies to H. C.

A held shares in a Company which were duly seized and sold in execution of a decree against him to B. The Judge, acting under section 267, Act VIII of 1859, executed deeds of transfer to the purchaser, and the Company was ordered to register the transfer in their books; but refused to comply with the order. The purchaser was unable to obtain from A the certificates of the shares. *Held*, that although the Company's deed of settlement (under which their Act of Parliament declared that the Company should be regulated) gave to the Board of Directors a power of approval or disapproval of intending shareholders, that they have no option as to registering a shareholder who purchased a share in execution, and that they were bound to grant him, under the circumstances, new share certificates—*The Queen*, on the prosecution of *Toolsee Doss Nundy* vs. *East Indian Railway Company*, 1 Ind. Jur., N. S., 258.

The conveyance by the Judge on the back of a mortgage deed above Rs. 100 in value requires registration—*Kanaheilal* vs. *Kali Din*, I. L. R., 2 Alla., 393.

Decree for immoveable property.

263. If the decree be for the delivery of any immoveable property, possession thereof shall be delivered over to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, and, if need be, by removing any person bound by the decree who refuses to vacate the property.

This section applies to H. C.

This section, it should be observed, relates to the delivery of what is known as *khas* (immediate or direct) possession of immoveable property under a decree of Court. Where such immoveable property is in the occupancy of a tenant or of some other person entitled to occupy the same, a delivery of possession should be given, as provided by the next section, 264; sections 328—331 provide for any resistance or obstruction to the delivery of possession complained of by the decree-holder, and section 332 to any complaint on the part of a third party to his being dispossessed in execution of the decree.

Much difficulty has been felt in this country in executing a decree obtained by the proprietor of an undivided share in immoveable property for *khas* possession as against his co-shares and their lessee, he being no party to such a lease. It has always been held that such possession should be given, or, as stated by the Calcutta High Court in the case of *Brohmomoyee Debia* vs. *Raj Chunder Roy*, 5 W. R., Mis. 15, "until a partition takes place she is entitled, incidently, to the enjoyment of her rights as co-proprietor in the talook, to partake in the joint possession of all the land, which was held *khas* by the co-sharers, or would be now so held by them, if they had not made the lease." And this rule was followed in the case of *Ranee Sahma Soonduree Debea* vs. *Jardine, Skinner & Co.*, 7 W. R., 376, in which also *khas* possession was given under section 263, as regards a portion of the claim, and as regards another portion in the occupancy of ryots possession was given under section 264. The lessee in such a case, if he cannot settle with the dissentient co-sharer, has no remedy but to obtain a partition, so that the shares of his lessors may be defined and separately held by him. A similar difficulty is felt where a decree has been given to a stranger for possession of a share in a family dwelling house, but as pointed out in the judgment of the Full Bench of the Calcutta High Court—*Koonwur Bejoy Keshub Roy Bahadoor* vs. *Shama Soonduree Dassee*, 2 W. R., 31, Mis.; B.L.R., Sup. Vol., 172; "if the petitioner (that is, the opposing member of the family) is subjected to any inconvenience, she has only herself to blame. She might have purchased the share

of the execution-debtors at the sale, or sued for partition, instead of resisting to the uttermost the claim of the purchaser, and setting at defiance the decrees of the Court." The Court, in that case, directed the Ameen, who had been appointed to execute the decree, to divide the property so as to give each of the parties a specific share. See section 310, *post*, for the preference given at an execution-sale to the bidding of a co-sharer in joint immoveable property, a share in which is being sold.

When, however, the Court gave the plaintiff a decree to recover the shares held in certain immoveable property by some of the defendants without determining or specifying the extent of those shares, it was held that no enquiry in execution of that decree could be made as to the extent or amount of the shares, but that the plaintiff should be left to seek, as against the other co-sharers, whatever remedy he might be entitled to—*Annoda Pershad Mookerjea* vs. *Toyluckhonath Pal Chowdhry*, 13 W. R., 123.

The fact that a decree-holder has obtained possession only under section 264 is no bar to his applying for and obtaining *khas* possession under section 263; even though he may have given an acknowledgment of his having received possession, and the execution case has been struck off accordingly—*Banee Mahtoon* vs. *Gopee Bhuggut*, 12 W. R., 285; *Adoremonee Dossee* vs. *Premchand Mussaut*, 9 W. R., 454; a second suit will not lie for this purpose—*Ram Suran Mahtoon* vs. *Jinonath Bhuggut*, 10 W. R., 396

Where an adverse title is unsuccessfully set up, the plaintiff is entitled to a decree for *khas* possession under section 263—*Raj Mungul Roy* vs. *Sreemutty Anundmoyee*, 99 W. R., 63; and having set up only an adverse title in the suit, the defendant cannot be allowed for the first time when the decree is being executed to plead his occupancy as a tenant—*Banee Mahtoon* vs. *Gopee Bhuggut*, 12 W. R., 285.

When a decree was given for possession of an undivided moiety of a house and premises, and the co-sharer, the defendant left, locking them up, the Court should in executing the decree direct possession to be given by breaking open the locks or doors—*Gunesh Chunder Shah* vs. *Ramdhonee Dassee*, 22 W. R., 283; but it should not demolish any building standing on the premises, when possession can be given by removing any obstructing defendant. It is for the decree-holder, when he has obtained possession, to determine how he should deal with the building—*Radha Gobind Shaha* vs. *Brijendro Coomar Roy Chowdhry*, 18 W. R., 527.

Possession should, however, not be given unless it is so ordered by the decree. So where the decree merely declared that a certain right and title adverse to the plaintiff was null and void, the Court was not competent to put the decree-holder in possession, since he had neither asked for, nor obtained, consequential relief—*Ameeroonnissa Khatoon* vs. *Abedoonnissa Khatoon*, 16 W. R., 307.

It not unfrequently happens that, through carelessness, decrees for possession of land fail to describe the land accurately, and therefore objections are raised in execution regarding the land which is covered by the decree. Where the plaintiff in his plaint describes the land that he claims as amounting to a certain area, lying within specified boundaries, and obtains a decree for the same within those boundaries, he is entitled to be put into possession although the area of such lands may exceed the area stated by him—*Zeenut Ali* vs. *Ram Dyal Poddar*, 18 W. R., 25.

Where some earth-works, described in the plaint as the boundaries of the lands for possession of which a decree was obtained, have ceased to exist, the Court executing the decree may take evidence to ascertain their former position. If it were not so, a defendant in possession might be able to defeat a decree obtained against him, simply by removing any landmarks mentioned in the plaint for the purpose of defining the property in suit—*Kales Debee* vs. *Modhoosoodun Chowdhry*, 16 W. R., 171. In that case the Court distinguished and explained the case of *Dwarkanath Huldar* vs. *Kamula Kant Haldar*, 12 W. R., 99, to mean that a plaintiff cannot be allowed to go into evidence for the purpose of contradicting a decree, or ascertaining in execution what ought to have been determined in the trial of the suit. Where, however, on enquiry, a boundary cannot be ascertained from obscurity in the plaint, and because it has been built upon by the judgment-debtor, that fact will not necessarily throw on the latter the onus of proving the pre-existent state of things, if the decree-holder has been guilty of laches in allowing the building and consequent obliteration without bringing it to the notice of the Court, (1) during the progress of the suit by getting the existing state of things properly defined to prevent dispute; or (2) after decree obtained, by taking out execution forthwith—*Radha Gobind Shaha* vs. *Brijendro Coomar Roy*, 18 W. R., 527. The present Code, it should be noted, in re-enacting section 223, Act VIII of 1859, in section 263, has omitted the words (immoveable property) "in the occupancy of a defendant, or of some person on his behalf, or of some person claiming under a title created by the defendant, subsequently to the institution of the suit" which appeared in section 223.

Lis Pendens.—Neither party to the litigation can alienate the property in dispute so as to affect his opponent, for otherwise it would be impossible that an action could be brought to a successful issue. In England this doctrine has a narrow operation, for there, unless a

lis pendens is duly registered, it will not bind a purchaser or mortgagee without express notice. There is nothing analogous to this in India, where the doctrine applies generally in the form in which it existed before the English statute, 2 Vic. Cap., 2—*Balaji Ganesh* vs. *Khushabji*, 11 Bom., 26; *Kasim Shaw* vs. *Unnodprosad Chaterjee*, 1 Hyde, 160; *Gulab Chand Manick Chand* vs. *Dhondi* valad *Bhan*, 11 Bom., 67. A grantee or vendee *pendente lite*, cannot question the decree or any proceeding in the cause which from the nature of the suit and the relief prayed for he might expect would take place—*Kaseemunnissa Bibee* vs. *Nilratna Bose*, I.L.R., 8 Cal., 79; 9 C. L. R., 173; 10 C. L.R., 113; a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir at law; but where the alienation is made during the pendency of a suit in which the creditor obtains a decree for payment of his debts out of the assets, the property may be followed if the alienee look with notice or under such circumstances as to make him affected by the doctrine of *lis pendens*—*Bazayet Hossein* vs. *Mahomed Wajed*, I. L. R., 4 Cal., 402. The doctrine does not apply to a purchaser at a sheriff's sale—*Gour Money Dabee* vs. *Reid*, 2 Tay. and Bell, 108, 121, and see *Ali Shah* vs. *Hussain Buksh*, I. L. R., 1 Alla., 588. Practically there is no difference between *lis pendens* and having notice of a suit—*Kasemunnissa Bibi* vs. *Nil Rutton Bose*, I. L. R., 8 Cal., 79; but the doctrine does not depend on notice—*Lakshmandas Sarupchand* vs. *Basrat*, I. L. R., 6 Bom., 168, and the alienee need not be made a party to the suit, and it is a matter of indifference whether or not at the time of his becoming grantee or vendee he had *actual* notice of the existence of the suit—*Gulabchand Manickchand* vs. *Dhondi* valad *Bhau*, 11 Bom., 64; *Umamoyi Burmoneea* vs. *Tarini Prashad Ghose*, 7 W. R., 225; *Mannal Fruval* vs. *Sanagpalli*, 7 Mad., 107. But the party seeking relief against a purchaser without notice must come within reasonable time; he must prosecute the case closely and continuously—*Kasim Shaw* vs. *Annodaproshad Chatterjee*, 1 Hyde 16. *Mrs. Maria Varden Seth Ram* vs. *Appundi Ibrahum Saib*, 6 Mad., 75; *Gourmoney Dabee* vs. *Reid*, 2 Tay. and Bell, 104. When the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the house by a registered mortgage to another person, it was held that the second mortgagee had no title against a purchaser under a decree for sale in the suit, although such purchaser was plaintiff in the suit—*Gulabchand Manickchand* vs. *Dhondi* valad *Bhau*, 11 Bom., 64. See 5 Alla., 167. See also *Luchmin Narain* vs. *Koteshar Nath*, I. L. R., 2 Alla., 826; and *Banjivan Govardhundas*, I. L. R., 4 Bom., 34; *Kailas Chundra Ghose* vs. *Fulchand Johurry*, 8 B. L. R., 474 and *Ram Lochun Sircar* vs. *Ramnarain*, 1 C. L. R.

In the case *Chunder Koomar Lahooree* vs. *Gopee Kisto Gossamee*, 20 W. R., 204 Glover, J., held that the alienation of property, the subject of a suit, after that suit had been dismised but before an appeal was preferred, was not opposed to the doctrine of *lis pendens*, as there was then no suit before the Court, but Dwarkanath Mitter, J., held *contra*, that the purchaser was bound to wait until the term of appeal had expired.

As to the distinction between the procedures to be followed where an equitable lien is created *pendente lite* and when there is an absolute sale by which the legal estate is transferred—see *Kasim Shaw* vs. *Unnodapersaud Chatterjee*, 1 Hyde, 160; 2 Sev., 811; *Gourmoney Dabee* vs. *Reid*, 2 Tay. and Bell., 100.

Delivery of immoveable property when in occupancy of tenant.

264. If the decree be for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same, and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property;

Provided that, if the occupant can be found, a notice in writing containing such substance shall be served upon him, and in such case no proclamation need be made.

This section applies to H. C.

The notes to the last preceding section are in many respects applicable here.

In executing a decree under this section the Court should confine its action strictly to the terms of the law, and should not add to the decree an order directing the ryots to pay rent to the decree-holder—*Gibbon* vs. *Sheo Purshun Misser*, 17 W. R., 236. "The substance of the decree in regard to the property" which must be "proclaimed to the occu-

pant" may or may not be a declaration that the decree-holder is the immediate landlord of the occupant, and as such entitled to receive rent directly from him, or there may be an intermediate holder. Probably both the intermediate tenant as well as the cultivating tenant or actual occupant would come within the terms of this section.

In order to establish a legal possession under section 264, it is necessary that all the requirements of that section should be carried out. Thus where it was not proved that a copy of the *hukmnamah* (warrant) was affixed in the village in dispute, though it had been affixed in other villages of the Raj, it was held that possession of that village was not a legal possession—*Court of Wards* vs. *Burra Lall Oopendronath Deo*, 15 W. R., 99. But if the party in possession when the decree is being executed admits to the Court that the decree-holder has formally obtained possession, he cannot afterwards plead a title on adverse possession for more than twelve years under the law of limitation, denying that the decree-holder ever received possession—*Bindoobashinee Dossee* vs. *Rainey*, 15 W. R., 307; 7 B. L. R., App., 20.

Symbolical possession is as against a party to the suit as good as actual possession for the purposes of limitation—*Joggobundhu Mukerjee* vs. *Ram Chunder Bysack*, I. L. R., 5 Cal., 584; 5 C. L. R., 548; *Mozuffer Wahid* vs. *Abdus Samad*, 6 C. L. R., 539; *Lokessur Kuer* vs. *Purgun Roy*, I. L. R., 7 Cal., 418; see note on section 319, *post*.

Partition of estate or separation of share.

265. If the decree be for the partition or for the separate possession of a share of an undivided estate paying revenue to Government, the partition of the estate or the separation of the share shall be made by the Collector and according to the law, if any, for the time being in force for the partition, or the separate possession of shares, of such estates.

This section applies to H. C.

Partion of a family dwelling house may be claimed as of right by a Hindu—*Hullodhur Mookerjee* vs. *Ramnath Mookerjee*, Marsh., 35.

A decree may be made for partition of a revenue paying estate, but must be carried out by the Collector—*Ramjoy Ghose* vs. *Ram Ranjun*, I. L. R., 8 Cal., 367, unless plaintiff does not seek to have his joint liability for the revenue to Government distributed—*Chundernath* vs. *Hur Narain*, I. L. R., 7 Cal., 153.

But where land was an accretion to an estate paying revenue to Government, but the revenue payable by each of the co-sharer proprietors had been fixed by the Collector, it was held that a suit for the partition of the "Chur" would lie in the Civil Courts, and was not a matter to be determined only by the revenue officers under Reg. XIX of 1814, section 3—*Ranee Sharut Soonduree Debia* vs. *Koer Poresh Narain Roy*, 13 W. R., Cr., 464. It does not appear whether any separate settlement of this "Chur" had been made by Government. Probably this was not so.

Where a party obtained a decree from the Civil Court declaring his right to certain shares in the village and directing a partition, but did not execute his decree within the prescribed period: *Held*, that he was not entitled to partition under Act XIX of 1863, section 47—*Kishen Singh* vs. *Dabeer Singh*, 2 Agra, 272.

In a decree for partition the right of each individual is determined, and an application by one party to execute may be continued by another—*Sheikh Khoorshed Hosein* vs. *Nubba Fatema*, I. L. R., 3 Cal., 551.

As to whether a Court in carrying out a partition case can depart from the decree, see *Rajcoomari Dassee* vs. *Gopal Chunder Bose*, I. L. R., 3 Cal., 514.

F.—Of Attachment of Property.

It is not necessary to issue an attachment in the case of a mortgage decree where the decree contains a direction to sell—*Dayachand Hemchand* vs. *Hemchand Dharamchand*, I. L. R., 4 Bom., 515 see also *Venkut Nasamma* vs. *Ramiah*, I. L. R., 2 Mad., 112.

Property liable to attachment and sale in execution of decree.

266. The following property is liable to attachment and sale in execution of a decree (namely), lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory-notes, Govern-

ment securities, bonds or other securities for money, debts, shares in the capital or joint stock of any railway, banking or other public Company or Corporation, and, except as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, and whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale (namely)—

(*a*) the necessary wearing apparel of the judgment-debtor, his wife and children;

(*b*) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle as may in the opinion of the Court be necessary to enable him to earn his livelihod as such;

(*c*) the materials of houses and other buildings belonging to and occupied by agriculturists;

(*d*) books of account;

(*e*) mere rights to sue for damages;

(*f*) any right of personal service;

(*g*) stipends and gratuities allowed to military and civil pensioners of Government, and political pensions;

(*h*) the salary of a public officer or of any servant to a Railway Company, when such salary does not exceed twenty rupees *per mensem*, and one moiety of the salary of any such officer or servant when his salary exceeds that amount;

(*i*) the pay and allowances of persons to whom the Native Articles of War apply;

(*j*) the wages of labourers and domestic servants;

(*k*) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(*l*) a right to future maintenance.

Explanation.—The particulars mentioned in clauses (*g*), (*h*), (*i*) and (*j*) are exempt from attachment or sale whether before or after they are actually payable :

Provided also that nothing in this section shall be deemed

(*a*) to exempt the materials of houses and other buildings from attachment or sale in execution of decrees for rent, or

(*b*) to affect the Army Act, 1881, or any similar law for the time being in force.

This section applies to H. C., and also to M. S. C. C., except so far as it relates to immoveable property.

Other saleable property.—A decree of Court is property within this section—*Gholam Mahomed* vs. *Indrachand Jahuri*, 7 B. L. R., 318, and see note on section 273, *post*; but account books are not—*In re Pestanji Cursetji Shroff*, 3 Bom., 42; though if a judgment-debtor attempts to make away with his account books in order to defeat the creditor, the Court may require him to produce them and leave them in the custody of the Court—*Adjoodhya Pershad* vs. *Middleton*, 3 Alla., 334; *Bhoza Rughbur Singh* vs. *Bhoza Raj Singh*, 3 Alla., 319.

The equity of redemption in mortgaged property can be attached and sold in execution of a decree against the mortgagor—*Goosain Munraj Pooree* vs. *Deen Dyal Lall*, 20 W. R., 20; *Saraswatte Dabee* vs. *Nabadwip Chunder Gosain*, 5 B. L. R., 380, unless the person applying for attachment and sale is also mortgagee—*Bhuggobutty Dossee* vs. *Shama Churn Bose*, I. L. R., 1 Cal., 337; *S. M. Kamini Debi* vs. *Ram Lochan Sircar*, 5 B. L. R., 450.

The share held by the judgment-debtor in the assets of a partnership business with the decree-holder, the business being in the hands of the Receiver of the Court under a decree for dissolution and winding up cannot be attached—*Abbott* vs. *Abbott and Crump*, 5 B.L.R., 382; *Karimbhai* vs. *Conservator of Forest*, I. L. R., 4 Bom., 222; see, however, *In re Bambridge*, L. R., 8 Ch. Div., 218; but where a decree-holder attached and seized certain goods which belonged to the judgment-debtor in partnership with another person, who alone at the time of attachment was in actual possession, it was held that such attachment must be limited to the share of the judgment-debtor, and should not be by nominal seizure but by prohibitory order—*Thama Singh* vs. *Kalidas Roy*, 5 B. L. R., 386; see also *Jyahvien* vs. *Chithambarien*, 5 Mad., 312.

Plaintiff permitted B to erect a thatched house with mud walls on his land and dwell in it for forty years; it was held that B had a saleable interest in the house and land—*Durgaprasad Misser* vs. *Brindaban Sookul*, 7 B. L. R., 159; 15 W. R., 274. Where A contracted to lay down a certain quantity of pavement for B, and, having carted paving stones to the works to the value of Rs. 100, received an advance of that sum from B. *Held*, that the materials had vested in B as purchaser, and could not be attached under a decree against A—*Reference*, 2 Alla., 337.

The interest of an undivided son of a Hindu family subject to mitakshara law is liable to attachment, the purchaser should sue out a partition—*Jallidar Singh* vs. *Ram Lall*, I. L. R., 4 Cal., 723; *Deendyal* vs. *Jugdeep Narain*, L. R., 4 Ind. App., 247; *Raj Narain Dass* vs. *Nownit Lall*, I. L. R., 4 Cal., 809.

Where A was only entitled to only a life interest in the residence of the real and personal property of B after all charges had been satisfied and full administration had taken place. Held his interest could not be sold in execution—*Bebee Tokai Sherob* vs. *Beglar*, 6 Moore., 510.

As to what property may be transferred see section 6 Act IV of 1882.

Necessary Wearing Apparel.—This is in accordance with the law laid down in the case of *Gungaram Velji* vs. *Parbhu Dayaram*, 9 Bom., 272. There is nothing in the law to prevent property in a Zenana from attachment—*Doorga Churn Mitter* vs. *Huree Mohun Gooho*, 17 W. R., 86; see also section 271, *post*; but ornaments on the person of a Hindu wife, in forming part of her stridhan, cannot be taken in execution of a decree against her husband. On certain occasions, under Hindu law, a husband may take them, but his right is a personal one—*Takaram* bin *Ramkrishna* vs. *Gunaji* bin *Mhaloji*, 8 Bom., 129.

Materials of houses.—This does not prohibit the sale of property specifically mortgaged, although the property be materials of a house belonging to or occupied by an agriculturist, I. L. R., 4 Bom., 25. A rent decree has priority over an ordinary money decree if executed against the house for which the rent was claimed—*Maniklal* vs. *Lakha*, I. L. R., 4 Bom., 429.

Right to sue for damages.—It has been held generally that the right to bring a suit or prefer an appeal cannot be attached and sold—*Arratoon Carapiet* vs. *Runa Lall Seal*, 14 W. R., 52; *Bipro Protab Sahee* vs. *Deo Narain Roy*, 3 W. R., Mis., 16; *Syud Tuffazal Hossein Khan* vs. *Ragunath Prasad*, 7 B. L. R., 186. But if a decree has been passed, it is capable of being attached and sold in satisfaction of the debts of the decree-holder—*Prince Gholam Mahomed* vs. *Indro Chand Johuree*, 15 W. R., 34; 7 B. L. R., 318. See "other saleable property," above.

Liquidated demands in their nature, definite and certain, though *sub lite* and unproved may be attached; but a thing incapable of being estimated or valued, such as "all the claims of Ramanath against all his debtors" cannot—*Syud Tuffazal Hossein* vs. *Raghunath Prasad*, 7 B. L. R., 86; so where A for valuable consideration contracted with B to satisfy a decree outstanding against him, and, instead of carrying out his agreement, purchased the decree, executed it and brought B's property to sale, it was held that the purchaser of B's right under the contract had no title to relief for the breach—*Syud Mahomed Hadee* vs. *Sheo Sevuk Doobey*, 6 Alla., 95.

Claims over which no Court in British India has jurisdiction are not debts liable to be attached under this section, though the mere circumstance that the ganirshee is at the time of the application for attachment beyond the limits of British India would not, of itself render the debts not liable to be attached—*Ghamshamlal* vs. *Bhansuli*, I. L. R., 5 Bom., 249.

Any right of personal service.—*Brith Moha Brahminee*, or the right to officiate at funeral ceremonies, cannot be attached, inasmuch as it is a thing intangible, impartible and incapable of transfer—*Jhumun Pandey* vs. *Dinoonath Pandey*, 16 W. R. 171; similarly the right of the sebait of a Hindu idol to perform the services and receive the remuneration is not subject to attachment—*Dubo Misser* vs. *Srinibas Misser*, 5 B. L. R., 617: *Kali Churn Goosain* vs. *Bangshee Mohun Doss*, 15 W. R., 339, 6 B. L. R., 727; *Juggurnath Roy Chowdhry* vs. *Kishen Pershad Surmah*, 7 W. R., 260; but if he is paid by the proceeds of landed property and there is a surplus after providing for the worship of the idol that interest can be attached—*Ashutosh Dutt* vs. *Doorga Churn Chatterjee*, L. R., 6 Ind. App., 182; but apparently the purchaser could not be entitled to enter on the lands—*Sib Churn Dass* vs. *Bonerjee*, 1 Boulnois, 73; *Juggoo Shundery Dossee* vs. *Byoakh*, 1 Boulnois, 269.

Ghatwally tenures are not liable in the hands of a ghatwal for the debts of his father —*Rajah Nilmoney Singh* vs. *Bakruath Singh*, L. R. 9 Ind. App., 104.

Stipends allowed to Military and Civil Pensioners of Government, and Political Stipends allowed by Government to the Members of the Mysore family cannot be attached—*Hazee Mohamed Kuzulbash* vs. *Shazada Mohamed Buseersoodeen*, 7 W. R., 169; nor can the stipends granted to the descendents of Azeem-oo-Dowlah, the Nawab of the Carnatic—*Mahomed Abdul Vakaf Sahib* vs. *Comandur Ramasamy Aiyingur*, 4 Mad., 277; so the arrears of yeomiah pension due to a deceased Zemindar are not liable to attachment—*Referred Case*; 5 Mad., 371; so also it has been held that allowances fixed under Act XI, 1843 (B. C.) cannot be attached in the hands of the Collector or other disbursing officer, but that as soon as it is in the hands of the hereditary officer himself it is deprived of any special protection—*Gunpatlal Anupram* vs. *Sampatram Ghelabhai*, 10 Bom., 400.

Salary of a Public Officer or of the servant of a Railway Company.—If it be desired to attach a moiety of the salary of a public officer or of the servant of a Railway Company, the attachment should be made under section 268 by a written order of the Court, prohibiting the creditor, that is the public officer or servant of the Railway Company, from recovering the debt due to him and the debtor, from making payment thereof until the further order of the Court—*Tukaram bin Ram Kishna* vs. *Gunaji bin Mhaloji*, 8 Bom., 129. An existing debt, though payable at a future day, may be attached whilst a salary wages or money claim accruing due may not. The sums attached must not be, inchoate, but existing and definite—*Syud Tuffazal Hossein* vs. *Raghunath Prasad*, 7 B. L. R., 195 8; *Bhoyrub Chunder Roy* vs. *Madhub Chunder Sen*, 6 C. L. R., 19; thus attachment may be made of such portion as has actually become due—*Tejram Jugrupaji* vs. *Kasaji Ganji*, 7 Bom., 110; *Koom Kanun* vs. *Michael*, Bourke, 259. As to the method of attaching, see in the matter of *J. Holeck*, 2 B. L. R., 109; *Megji Hansraj* vs *Ramji Joita*, 8 Bom., 169; but whether arrears of interest due on a government promissory note blank endorsed and payable to bearer under the terms of the instrument, is a debt seizable is not quite clear—*Bysack* vs. *Batty*, 1 Tay. and Bell, 313.

Apart from the special provisions of this Act any money given by Government to its servants not only for past, but also as a return for future service cannot be attached—Thus the pay of a Government Official is not attachable—*Rajbullub Seal* vs. *Mackenzie Fulton*, 82, nor is half-pay, as the money is to some extent received for future services; but money actually due solely in respect of past services such as a pension is liable to sequestration—*Dent* vs. *Dent*, L. R., 1 P. & M., 366. As to the form of the order to get at the pension —see *Willcock* vs. *Ferrell*, 3 Ex. Div., 323.

Military Officers.—To justify attachment of pay under this section, the applicant must shew that the pay is a debt due to, or in some form or other the property of the judgment-debtor It is a general rule that a debt which the debtor cannot sue for cannot

be attached, and as an officer cannot maintain any such action his pay cannot be attached under the Code. It may be under section 99 of the Mutiny Act—8 C. L. (N. W.), 1875, provided provision for its stoppage has been made in the decree—*Bansi Lal* vs. *Col. Mercer*, 7 Alla., 381.

Act V of 1869, the Indian Articles of War, Part III, clause (*b.*), declares that "the pay or allowance or any part thereof" of any person enlisted under that Act or any previous Articles of War for Her Majesty's Indian Army, shall not "be attached in satisfaction of any judgment against him or any person whom he may represent," and a previous portion of this clause declares that such person shall not be liable to be "arrested for debt under any process issued by, or by authority of, any Court of law," but that on such an arrest the Court shall discharge such person and award him reasonable costs. Act XI of 1840 contains the law for the recovery of debts due from such persons through Military Courts of Request.

Labourers.—Labourers are persons who earn their daily bread by personal manual labour, or in occupations which require little or no art, skill, or previous education—*Jichand Khasal* vs. *Aba*, I. L. R., 5 Bom., 132.

An Expectancy of succession.—This clause would include the right and title of the next heir on the death of a Hindu lady having only a life interest—see *Ram Chunder Tantra Dass* vs. *Dhurmo Narain Chuckerbutty*, 15 W. R., 17, 7 B.L.R., 341; but not those of a son under mitakshara law whose rights co-exist jointly with his father from his birth—*Syud Tuffazal Hossein Khan* vs. *Raghunath Prasad*, 7 B.L.R., 196: and as to the right of a purchaser at a sale under such an attachment see—*Deen Dyal Lal* vs. *Jugdeep Narain Singh*, L. R., 4 Ind. App., 247; 1 C. L. R., 49.

See as to the effect of selling the interests of a widow and reversioner under Act VIII of 1859—*Jebun Krishna Banerjee* vs. *Ramakant Roy Chowdhury*, 1 Shome, 35.

See as to a future interest—*Ahmaduddin Khan* vs. *Moljisnal*, I. L. R., 3 Alla., 12.

Right to future Maintenance.—Although a mere right to future maintenance cannot be attached—*Kasheeshuree Debia* vs. *Greesh Chunder Lahooree*, 6 W. R., Mis., 64, yet if the maintenance is an existing debt, though payable on a future day, it is not exempt—*Syud Tuffazal Hossein Khan* vs. *Ragdunath Prasad*, 7 B. L. R., 186; *Hoy Mobutty Debia Chowdhrain* vs. *Koroona Moyee Debia Chowdhrain*, 8 W. R., 41. Thus it has been held that, in view of an instalment of maintenance payable under a decree being about to become due, the Court may make an order for the non-payment of such instalment by the party chargeable and its non-receipt by the judgment-debtor, or an arrangement may be made under section 268 for the collection or administration, if necessary, of the amount of the maintenance—*Monessur Doss* vs. *Beer Protab Sohee*, 15 W. R., 188; 6 B. L. R., 646; so an annuity, the payment of which is a charge on an estate, can be attached in payment of debts due to him by the person who has inherited the estate from his grantor, and by whom such annuity is now payable—*Maharajah Dheraj Mahatab Chand Bahadoor* vs. *Sreemutty Dhun Coomaree Bibee*, 17 W. R., 254; so also where a deed grants a regular maintenance payable from the grantor's estate and recoverable in Court on non-payment, such allowance is property which can be attached—*Enayet Hossein* vs. *Nujeebonnissa Begum*, 11 W. R., 138. But see *Koomaree Dabea* vs. *Greesh Chunder Lahoory*, Marsh., 200.

Power to summon and examine persons as to property liable to be seized.

267. The Court may, of its own motion or on the application of the decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized in satisfaction of the decree, and may require the person summoned to produce any document in his possession or power relating to such property, and, before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued.

This section applies to H. C. and M. S. C. C.

This inquiry is not for the purpose of ascertaining the meaning of a decree. That should appear on the face of the decree itself, and if it does not, the decree cannot be executed. It is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court of execution to decide what the Judge intended to decree. If, by reason of an uncertainty in a mortgage deed, or an uncertainty in the plaint, or an uncertainty in the evidence, the Judge could not ascertain what particular right the plaintiff was entitled to, he ought not to give the plaintiff a decree so uncertain that the Court of execution could not know what he intended to award—*Dwarka Nath Haldar* vs. *Komola Kant Haldar*, 12 W. R., 99.

But evidence may always be taken to ascertain what is the subject upon which the decree operates, as, for instance, when the judgment-creditor calls upon the Court to put him into possession of the property which has been decreed to him. Thus where the judgment-debtor objects that the land of which the decree-holder applies to be put into possession is not identical with that which was decreed, an enquiry should be held in which the judgment-debtor is, at least in honesty, bound to point out what is the actual property, the subject of the decree—*Bhogobat Singh* vs. *Ram Adhin Singh*, 22 W. R., 330; so the judgment-creditor may, if he has applied to attach debts, call upon the debtor to produce his account books—*Adjoodhya Pershad* vs. *Middleton*, 3 Alla., 334. See also *Maharajah Rajendro Kishore Singh* vs. *Hyabul Singh*, 17 W. R., 379.

Where, however, a decree is given against two co-sharers in a property it can be executed only as against them, and no enquiry can be made, in executing that decree by delivery of possession, in respect to the amount of the shares of those persons in relation to others. That should be determined, if necessary, in a separate suit—*Annoda Pershad Mookerjee* vs. *Troyluckhonath Paul Chowdhry*, 13 W. R., 123.

Attachment of debt, share and other property not in possession of judgment-debtor.

268. In the case of (*a*) a debt not secured by a negotiable instrument, (*b*) a share in the capital of any public Company or Corporation, (*c*) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court, the attachment shall be made by a written order prohibiting,

(*a*) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

As to the meaning of the word "debt" see—*Woulfe* vs. *Menohane*, 4 L. R. (Ireland), 322; *Hall* vs. *Pritchett*, 3 Q. B. Div., 215; *Dolphin* vs. *Layton*, 4 C. P. Div., 130; *Williams* vs. *Harding*, L. R., 1 H. L., 1.

(*b*) in the case of the share, the person in whose name the share may be standing, from transferring the same or receiving any dividend thereon;

(*c*) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

A copy of such order shall be fixed up in some conspicuous part of the court-house, and another copy of the same shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the Company or Corporation, and in the case of the other moveable property [except as aforesaid], to the person in possession of the same.

Shall be sent to the Debtor.—It would seem as if service by affixing the copy to the wall of the dwelling house would not be sufficient service—*Gobind Chunder Dutt* vs. *Kherode Chunder Mitter*, 10 B. L. R., App., 12.

A debtor prohibited under clause (*a*) of this section may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

In the case of the salary of a public officer or the servant of a Railway Company, the attachment shall be made by a written order requiring the officer whose duty it is to disburse the salary to withhold every month such portion as the Court may direct, until the further orders of the Court.

A copy of every such order shall be fixed up in a conspicious part of the court-house and shall be served on the officer so required.

Every such officer may from time to time pay into court any portion so withheld, and such payment shall discharge the Government or the Railway Company, as the case may be, as effectually as payment to the judgment-debtor.

This section applies to H. C. and M. S. C. C.

An execution creditor cannot sue any person having property of his judgment-debtor in his possession. He must proceed under this section—*Mirza Mahomed* vs. *The widow of Balmakund*, L. R., 3 Ind. App., 241, 245.

In applying for an attachment of any moveable property belonging to the judgment-debtor, but not in his possession, the decree-holder must annex to the application an inventory of the property to be attached containing a reasonably accurate description of the same —section 236. Until he has been served with a notice under section 268, a debtor is bound to pay to his creditor money due to him, and it is not his duty to ascertain whether such payment should be made to another—*Thakoor Doss Singh* vs. *Luchmeeput Doogur*, 7 W. R., 10. If the attachment is made after a cheque for the amount has been given, the cheque cannot be stopped—*Bhagavan Das* vs. *Abdul Hossein*, I. L. R., 3 Bom., 49. The judgment-creditor does not obtain a charge on the debts until the order has been served—In re *Stanhope Silkstone Collieries Co.*, 11 Ch. Div., 160, but there appears to be no difference between an order absolute and an order *nisi*—ex-parte *Joselyne*, 8 Ch Div., 333.

A person who, as debtor, is served with an order under this section cannot apply under section 278 to have the attachment removed—*Harilal Amthabhai* vs. *Abhesang Meru*, I. L. R., 4 Bom., 323.

A creditor, who attaches a debt due to his judgment-debtor, is not in the same position as an assignee of such debt for value without notice of a prior assignment, but in respect to prior assignments stands in no better position than his judgment-debtor. An assignment prior to attachment that is good against the judgment-debtor is also as a general rule good against his attaching creditor. Notice to the holder of funds is not necessary to complete, *as against the assignor*, an equitable assignment of such funds—*Megji Hansraj* vs. *Ramjee Jorta*, 8 Bom., 169.

Bonds, or other property attached under this section can not be sold till the end of six months after the attachment, and if the Court cannot appoint a receiver as a Small Cause Court could not under Act X of 1877, any bond barred by limitation before the date on which the sale can legally take place is not available for satisfaction of the judgment-creditor's debt—*Nursing Das Rughunath Dass* vs. *Tulseram*, I. L. R., 2 Bom., 558

A Small Cause Court cannot issue an order beyond its jurisdiction—*Munshi Hosein Ally* vs. *Ashotosh Gangolly*, 3 C. L. R., 30.

Attachment of moveable property in possession of judgment-debtor.

269. If the property be moveable property in the possession of the judgment-debtor, other than the property mentioned in the first proviso to section 266, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody will exceed its value, the proper officer may sell it at once.

Proviso.

The Local Government may, from time to time, make rules for the maintenance and custody, while under attachment, of live-stock and other moveable property, and the officer attaching property under this section shall, notwithstanding the provisions of the former part of this section, act in accordance with such rules.

Power to make rules for maintenance of attached live-stock.

This section applies to H. C. and M. S. C. C.

Crops which have not been severed from the ground are not moveable property—*Mahomed Sulieman* valad *Muhammad Ishakbhai* vs. *Satu* valad *Harji*, 5 Bom., 90; nor are tiled huts—*Raj Chunder Bose* vs. *Dharmo Chunder Bose*, 10 W. R., 416; but stone sugar mills are moveables—*Hurmungul Singh* vs. *Athul Singh*, 4 Alla., 15. But see *Miller* vs. *Brindabun*, I. L. R., 4 Cal., 946.

The High Court, Allahabad, empowered their Subordinate Courts, acting under section 233, Act VIII, 1859, to issue process of attachment and sale against personal estate other than debts, either successively or simultaneously as might be deemed proper—Cir. Or. No. 6 of 1867. But see *Fin. Assoc.* vs. *Pranjibandas*, 3 Bom., 25.

270. If the property be a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to the further orders of the Court.

Attachment of negotiable instruments.

This section applies to H. C. and M. S. C. C.

271. No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise, or shall break open any outer door of a dwelling-house. But, when any such person has duly gained access to any dwelling-house, he may unfasten and open the door of any room in which he has reason to believe any such property to be:

Seizure of property in building.

Provided that if the room be in the actual occupancy of a woman, who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to her that she is at liberty to withdraw; and after allowing a reasonable time for such woman to withdraw, and giving her every reasonable facility for withdrawing, he may

Seizure of property in zenanas.

enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

This section applies to H. C. and M. S. C. C.

A person executing a process of attachment of moveable property having gained access to a house has a right to remove the lock from the door of a room in which he has reasonable ground for supposing the moveable property to be locked—*Kondasawmy Pillay* vs. *Krishnaswmy Pillay*, 5 Mad., 189; and though he cannot break open the outer door of a dwelling-house, he may break open the door of a shop or godown—*Damodhar Parsotum* vs. *Ishvar Jetha*, I. L. R., 3 Bom., 89.

Under Act VIII, 1859, it was held that a Nazir authorized to execute a warrant by attachment of moveable property had power to remove locks put by the judgment-debtor on the doors of the godowns or other places where the property was stored, and to put on his own locks for the purpose of attachment and safe custody of the property—*Sowdamini Dasi* vs. *Jageswar Sur*, 5 B.L.R. App., 27; 13 W. R., 339; but if he broke open the door in execution, he was a trespasser if it turned out that the person or goods of the debtor were not in the house—*Reg* vs. *Gazi, Kom Aba Dore*, 7 Bom., Cr, 83.

A judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without motive and mistakenly—*Damoodur Tuljaram* vs. *Lallu Khusaldas*, 8 Bom., 177. Every person who directs, orders, or procures the commission of a trespass is liable as a wrong-doer and trespasser; and under a system where any remedy against the officer executing the powers of the Court would be utterly nugatory, it is peculiarly necessary not to relax the rule as to the liability of the decree-holder for his own acts, or those of his agents in causing the decree to be executed—*Mussamut Subjan Bibi* vs. *Sheikh Sariatulla*, 12 W. R., 329; 3 B.L.R., 414; *Goma Mehad Patil* vs. *Gokel Das Khimji*, I. L. R., 3 Bom., 74. See also *Rajbullub Gope* vs. *Issan Chunder Hajrah*, 7 W. R., 355, which was distinguished and explained. A warrant authorizes the attachment of the goods of A; if the decree-holder points out to the officer of the Court, and causes him to attach and remove the goods of B, as the goods of A, he is a wrong-doer, and cannot in any way justify his proceedings under the warrant. In causing B's goods to be attached and taken out of his possession he procures a trespass to be done to B. If a man for his own profit and advantage wrongfully and without any warrant of law trespasses upon the land of another, takes away his goods, or procures his goods to be seized and taken out of his possession, he is responsible, even though he acts honestly or mistakenly. A party to a suit is liable, if by his order the officer takes the goods of the wrong person, a stranger, in execution; and in like manner he is responsible if his attorney or agent, in taking a step necessary to enable his client to get the fruits of a decree, inadvertently or ignorantly cause the person or property of a stranger to be seized by the officer of the Court—*Goma Mehad Patil* vs. *Gokel Das Khimiji*, I. L. R., 3 Bom., 74.

This section does not apply to the arrest of a pardanesheen lady—*Kadumbinie Dossee* vs. *Koylash Kamenie Dossee*, I. L. R., 7 Cal., 19.

Attachment of property deposited in Court or with Government Officer.

272. If the property be deposited in, or be in the custody of, any Court or public officer, the attachment shall be made by a notice to such Court or Officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice issues.

Proviso.

Provided that, if such property is deposited in, or is in the custody of, a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

This section applies to H. C. and M. S. C. C.

The Court has no power to refuse an application for attachment under this section—*Noor Jehan Bagum* vs. *Mashitty Khanum*, 8 C. L. R., 17.

All questions relating to the appropriation of money deposited in a Court should be heard by that Court, and not by the Court making the order of attachment—*Goopenath Acharjia* vs. *Achcha Bibi*, I. L. R., 7 Cal., 553. Claimants should not be referred to a separate suit—*Debee Pershad* vs. *Gujadhur Ram*, 20 W. R., 73; *Wooma Moyee Burmonya* vs. *Ram Buksh Chitlangee*, 16 W. R., 11, *Kooerdee Sudow* vs. *Kamola Kant Chuckerbutty*, Suth., S. C. C. Ref., 11. But where an order issued directing a Judge to pay certain monies to A and the amount was attached by B before payment it was held that the effect of the order being to vest the money in A, the Judge could not go into any question of priority between A and B—*Gopenath Acharje* vs. *Achcha Bibi*, I. L. R., 7 Cal., 553.

In the custody of a Court or Public Officer.—Where the money attached is money deposited with the Collector and not in the Court, the Judge making the attachment has no authority to decide claims to the deposit—In the matter of *Brojonath Mitter*, 13 W. R., 301. If an attachment has been made the Collector is not competent to pay away the money to an attaching decree-holder without the express order of the Court—*Saefoolah Khan* vs. *Luchmeeput Singh Doogar*, 13 W. R., 58

The fact that a notice of attachment has been served on the Court in which the money is deposited is sufficient to complete the attachment. The refusal of the Judge to receive such a notice cannot make that void which would otherwise be a good attachment—*John Teil & Co.* vs *Abdool Hye*, 19 W. R., 37

An attachment is only good so far as it relates to a specified amount set forth in the request it is not sufficient merely to request the officer to hold sums which are or might be payable to the debtor, subject to the order of Court—*Nilkunt Day* vs *Hurro Soondary Dossee*, 1 Shome, 123.

The balance in the hands of a sheriff may be attached—*Woulfe* vs. *Minihane*, 4 L. R., Ir., 322.

Quære whether an order made by a Court under this section is final—*Gopeenath Acharjee* vs. *Achoha Bibi*, I. L. R., 7 Cal., 553

Attachment of decree for money.

273. If the property be a decree for money passed by the Court which passed the decree sought to be executed, the attachment shall be made by an order of the Court directing the proceeds of the former decree to be applied in satisfaction of the latter decree.

Although the two decrees are not passed in the same Court yet if they are executed by the same Court this clause applies—*Sultan Koer* vs. *Gulzari Lal*, I. L. R., 2 Alla., 290.

If the property be a decree for money passed by any other Court, the attachment shall be made by a notice in writing to such Court under the hand of the Judge of the Court which passed the decree sought to be executed, requesting the former Court to stay the execution of its decree until such notice is cancelled by the Court from which it was sent. The Court receiving such notice shall stay execution accordingly, unless and until

(*a*) the Court which passed the decree sought to be executed cancels the notice, or

(*b*) the holder of the decree sought to be executed applies to the Court receiving such notice to execute its own decree.

On receiving such application, the Court shall proceed to execute the decree and apply the proceeds in satisfaction of the decree sought to be executed.

Attachment of other decrees.

In the case of all other decrees the attachment shall be made by notice in writing, under the hand of the Judge of the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, when such decree has been passed by any other Court, also by sending to such Court a like notice in writing to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. Every Court receiving such notice shall give effect to the same until it is so cancelled.

This clause applies to decrees other than money decrees—*Sultan Kuer* vs. *Gulzari Lal*, I. L. R., 2 Alla., 290.

Decree-holders to give information.

The holder of any decree attached under this section shall be bound to give the Court executing the same such information and aid as may reasonably be required.

This section applies to H. C. and also to M. S. C. C., as far as relates to decrees for moveable property.

The Allahabad Court has held that the Code does not contemplate the sale of a decree in execution of a decree—*Sultan Koer* vs. *Galzari Lal*, I. L. R., 2 Alla., 290. This has not been the practice in Bengal—*Gholam Mahommed* vs. *Indrochand Lahuri*, 7 B. L. R., 818; *Gonesh Lall Tewari* vs. *Sham Narain*, I. L. R., 6 Cal., 213; *Gunesh Chunder Chuckerbutty* vs. *Besesswari Debia*, I. L. R., 6 Cal., 243.

Attachment of immoveable property

274. If the property be immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise.

The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court-house.

When the property is land paying revenue to Government, a copy of the order shall also be fixed up in the office of the Collector of the District in which the land is situate.

This section applies to H. C.

Section 237 and 238, *ante*, declare how application for attachments of immoveable property should be made. Where separate local jurisdiction has been given to Munsifs under section 18 Act VI of 1871, one Munsif cannot directly attach property within the jurisdiction of another—*Obhoy Churn Kondoo* vs. *Golam Ali*, 9 C. L. R., 361, I. L. R., 7 Cal., 410.

By beat of drum or other customary mode—In Bengal it is usual to notify this by sticking up a bamboo as well as by beat of drum. A copy must be affixed on a conspicuous part of the property attached—*Kalitara Chowdhrain* vs. *Ram Coomar Goopto*, 9 C. L. R., 114.

The proper mode of attaching a factory pledged subject to the claims of a prior mortgage in possession should be constructive, by issue of a written notice under this section. The decree-holder has no power to disturb the possession of the prior mortgagee by putting peons in possession—*Nudhun Mohun Doss* vs. *Gokul Doss*, Moore, 571.

An attachment without specifying the share is an attachment of the debtor's entire interest—*Suroop Narain Singh* vs. *Ram Tobul Misser*, 18 W. R., 106.

Order for withdrawal of attachment after satisfaction of decree.

275. If the amount decreed with costs and all charges and expenses resulting from the attachment of any property be paid into court, or if satisfaction of the decree be otherwise made through the Court, or if the decree is set aside or reversed, an order shall be issued, on the application of any person interested in the property, for the withdrawal of the attachment.

This section applies to H. C. and M. S. C. C.

Private alienation of property after attachment to be void.

276. When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

This section applies to H. C. and M. S. C. C.

The law governing alienations by debtors is the *lex rei situ*—*Gopee Chunder* vs. *Ramkumul*, W. R., 1864, p. 179.

Until there is a sale in execution of the judgment-debter's estate the right of property remains in him—*Wagji Kerji* vs. *Tharia Topan*, I. L. R., 3 Bom., 61; but an order of sale in addition to attachment under a mortgage decree creates a valid charge on the property—*Suraj Bunsi Koer* vs. *Shib Pershad Sing*, I. L. R., 5 Cal., 148.

An attaching creditor has not, as such, any right to redeem a mortgage upon the property attached by him—*Shoobul Chunder Paul* vs. *Netye Churn Bysack*, 7 C. L. R., 201; I. L. R., 6 Cal., 663., though he may oppose probate of the debtor will—*Kamol Lochun Dutt* vs. *Nilruttun Mundle*, I. L. R., 4 Cal., 360. In the matter of *Nilmoney Singh*, I. L. R., 6 Cal., 429; In the matter of *Bhobosoondure Dabee*, I. L. R., 6 Cal., 460.

During continuance of the attachment.—An alienation before attachment is good even though the parties may know that a judgment-creditor was seeking to get process of execution against that property, provided that such alienation was *bonâ fide* and for valuable consideration—*Fegredo* vs. *Mahomed Mudessur*, 15 W. R., 75; *Ram Burun Singh* vs. *Jankee Sahoo*, 22 W. R., 479; and a debtor may, although unsatisfied decrees be outstanding against him, prior to attachment, give a preference to a particular creditor or class of creditors over others, and this notwithstanding that the effect of the alienation or preference may be to defeat the operation of an anticipated execution—*Cecil Stephenson* vs. *Col. Bomgartner*, 3 Agra, 104; *Doorga Tewaree* vs. *Naipal Aheer*, 2 Alla., 224; *Khetter Mal* vs. *Chuni Lal*, I. L. R., 2 Alla., 173; *Sheo Proshad* vs. *Millor Rajan Horji* vs. *Ardishir*, I. L. R., 4 Bom., 70. See I. L. R., 2 Alla., 474; see however section 53 Act IV of 1882. The leading case on the subject is that of *Puddomonee Dossee* vs. *Roy Mothooranath Chowdhry*, 20 W. R., 133; 12 B. L. R., 411, in which their Lordships of the Privy Council stated as settled law that if an attachment has been permanently struck off and a new

attachment has become necessary, a conveyance executed between the two attachments is valid, but it was thought doubtful whether as a consequence of this a conveyance executed whilst the first attachment was subsisting becomes valid by relation, or ceases to be void as against the execution-creditor and all who claim under him. Their Lordships further stated: "Generally when the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not wish to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently shew that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained."

In the manner aforesaid.—It is necessary, in order to set aside any private alienation, to shew that all the conditions mentioned in the section applicable to the case, have been fulfilled, and the purchaser bought at a sale in execution—*Dinendro Nath Sannyal* vs. *Ram Coomar Ghose*, 10 C. L. R., 281; I. L. R., 7 Cal., 107. Thus when the property is land paying revenue to Government it must be shewn that (1) the written order has been proclaimed at some place on or adjacent to such property, and (2) has been fixed in a conspicuous part of the property and of the Court-house, and (3) in the office of the Collector—*Indra Chandra Babu* vs. *The Agra and Masterman's Bank*, 1 B.L.R., S. N., 20; *Nur Ahmed* vs. *Altef Ali*, I. L. R., 2 Alla., 58. And where there was no attachment in the manner prescribed, but the property was advertised for sale, and the judgment-debtor encumbered the property with a lien, it was held that the sale only passed the property subject to the lien, which was not proved to be collusive—*Sahoo Chund* vs. *Gutum Singh*, 2 Agra, 206. See also *Rameswar Sing* vs. *Ramtanu Ghose*, 4 B.L.R., 24. See also *Gumani* vs. *Hardwar Pandey*, I. L. R., 3 Alla., 698. There must be a decree in existence to support the attachment. A obtained a decree *ex-parte* against B, and attached his property; while under attachment B sold the property to C, and afterwards applied for an order under section 119, Act VIII, 1859, to set aside A's decree and for a new trial. The order was granted. *Held*, that the effect of the order was to shew that the decree was invalid, and that C's purchase was not null and void—*Lala Jagat Narayan* vs. *Tulsiram*, 1 B. L. R., 71.

Objections on the ground that the proper formalities have not been carried out can not be raised for the first time before the Privy Council—*Ram Kishen Dass* vs. *Surfunnessa*, I. L. R., 6 Cal., 129.

Enforceable under the attachment.—The law here expressed is that first laid down by a Full Bench of the Calcutta High Court in the case of *Anundolall Doss* vs. *Radamohun Shaw*, 11 W. R., O. C., 1; 2 B.L.R., 29, which was affirmed on appeal by the Privy Council, (see 17 W. R., 313; 10 B. L. R., 134); and amounts to this, that the alienation is null and void only as against the attaching creditor or persons who may acquire under or through the attachment and not as against the whole world—see also *Puddomonee Dossee* vs. *Roy Mothooranath*, 12 B. L. R., 411 and only so far as may be necessary to effect the execution of the decree—*Dinendronath Sannyal* vs. *Ram Kumar Ghose*, I. L. R., 7 Cal., 107; so that if the decree is subsequently satisfied the alienation is binding on the debtor—*Umesh Chunder Roy* vs. *Raj Bullubh Sen*, 10 C. L. R., 204. Thus a sale to the creditor—*Annavundabun* vs. *Iysawmy Pillai*, 6 Mad., 65, or the sale or mortgage of the attached property to pay off the judgment-debt is not void—*Balaij Ramchandra* vs. *Gajonan Babaji*, 11 Bom., 159; *Buldee Singh* vs. *Kanaha*, 1 Alla., 125; and the purchaser of the right, title and interest of the judgment-debtor in certain immoveable property at an auction sale which took place at the instance of a second attaching creditor was held to take the property subject to an incumbrance created by the judgment-debtor, pending the first but prior to the second attachment, although the first attaching creditor was paid out of the proceeds—*Guru Persad Sahu* vs. *Mussamut Binda Bibi*, 9 B.L.R., 180; and where a judgment-debtor raised a sum of money by a sale of part of attached property, and devoted some of the money to a payment on account of the judgment-creditor who withdrew from the execution and attachment, it was held that the decree-holder, having assented to the sale, the vendee had a good title—*Prannath Mitter* vs. *Shumboo Chunder Nath*, 7 W. R., 430. See also 1 Alla., pp. 18, 30. An alienation null and void, because made when an attachment was subsisting, does not become valid merely by the removal of the attachment—*Ram Churn Lall* vs. *Jhubboo Sahoo*, 14 W. R., 25

Private alienation.—This does not refer to an alienation effected by a vesting order of the Insolvent Court; such an alienation is rather an alienation by operation of law than one by the judgment-debtor—*Sarkies* vs. *Mussamut Bundho Baee*, 1 Alla., 172.

As to what is a private alienation see *Qurhan Ali* vs. *Ashraf Ali*, I. L. R., 4 Alla., 219.

The effect of striking off an execution case.—In the case of *Mussamut Zahuran* vs. *Taylor*, 2 B. L. R., 86, Peacock, C. J., stated, p. 92: "I find no authority in Act VIII of 1859 for saying that an attachment is at an end, because the execution case is struck off the file." But when both parties had notice to appear on a certain date for the hearing and final determination of the execution proceedings, and on their non-appearance the case was struck off, it was held that that amounted to a "complete termination of the case," the order so made having the "effect of removing the attachment and putting an end to the execution proceedings altogether"—*Mussamut Binda Bibee* vs. *Lalla Gopeenath*, 21 W. R., 66; 14 B. L. R., 323; *Chumun Lall Chowdhry* vs. *Domun Lall*, 9 W. R., 205. Where, however, certain moneys, in deposit in Court, were attached in execution of a decree, and those execution proceedings were struck off (there being some delay in consequence of litigation on account of a dispute as to the right to the decree), it was held that the order striking off the case would affect only the files of the Court, and would not interfere with the continuance of the attachment—*Syud Nadir Hossein* vs. *Baboo Pearoo Thovildarnee*, 19 W. R., 255., 14 B. L. R., 425, *note*: so in the case—*Jhobboo Sahoo* vs. *Ram Churn Roy*, 11 W. R., 517; 3 B. L. R., App., 68, Macpherson, J., observed: "I confess that it appears to me that the question whether 'an execution case' has or has not been 'struck off the file' is of little importance as affecting the validity and continuance of an attachment, except in so far as the striking off may be a legal proceeding binding on the person at whose suit the attachment issued, and operating as a legal withdrawal of all the proceedings in execution or of the attachment. If the case arose, I should probably have little hesitation in holding that a striking off, such as I fear often occurs when the proceedings are struck off by the Court of its own motion and without notice to the parties, on any legal ground whatever, in no way withdraws or affects the validity of an attachment, and is not binding on the judgment-creditor." See also *Sheikh Golam Yaheya* vs. *Mussamut Sham Soonduree*, 12 W. R., 142; 3 B. L. R., App., 134; *Mookhesur Rai* vs. *Ramphul Sahoo*, 5 Alla., 70; and this is in accordance with the opinion of the Privy Council in the case of *Rajah Mohesh Narain Singh* vs. *Kishanund Miser*, 9 Moore, 324. At p. 337, their Lordships say: "It would be contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when, for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings, as regards that execution, are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit." See also *Surdharee Lall* vs. *Girindur Chunder Ghose*, 1 C. L. R., 475. If the decree-holder, at the instance and for the benefit of the debtor, consents to a postponement for a certain time to enable the debtor to meet his liabilities, on condition that the attachment remains in force and the Court, merely with a view to keep its files clear, strikes off the case, such an order striking off the case, which is not a proper order, cannot affect the attachment—*Mungul Pershad Dichit* vs. *Girja Kant Lahori*, I. L. R., 8 Cal., 51; *Sheo Gholam Lall* vs. *Bani Prosad*, 4 C. L. R., 29; *Chumun Lall Chowdhry* vs. *Domun Lall*, 9 W. R., 205; see also *Binda Bibee* vs. *Lalla Gopeenath*, 14 B. L. R., 323; and if a Judge has struck a case off improperly he can restore it again—*Mussamut Zahoorun* vs. *Taylor*, 10 W. R., 380; 3 B. L. R., 86.

But where attachment having issued on an application for execution of a decree, proceedings were on the 31st December 1873 stayed for a month, by consent, and the execution case was "struck off for the present;" and on the 30th a fresh application for *attachment* and *sale* was made—*Held*, that there was no attachment subsisting between the 31st of December 1873 and the 30th of November 1874—*Gungagatti Pal* vs. *Ram Sunder Dutt*, 8 C. L. R., 157.

Where a decree had been passed for the payment of a certain sum of money by instalments, and on default of an instalment certain property was attached, the money then due being paid by the debtor out of the proceeds of the private sale of that property, it was held that the alienation was good as the object of the law (section 274) is to secure execution of the decree and to prevent the attachment from being rendered worthless by an alienation; that the Court was not competent to direct attachment to continue to ensure the payment of moneys not yet payable; and that such an order could not affect the alienation by which the money due was paid off—

Ramdhun Mitter vs. *Koylashnath Dutt*, 12 W. R., 457; 4 B. L. R., 20. Where, notwithstanding a previous attachment, certain property was sold under another attachment, but the purchase-money was paid to the first attaching creditor, it was held that the application of the purchase-money could not affect the purchaser's title, and he could not plead that an alienation made under the second attachment was void because it had been made when the property was subject to the first attachment—*Gooroo Pershad Sahoo* vs. *Binda Bibee*, 18 W. R., 279; 9 B. L. R., 180. Where the decree-holder, when called upon to furnish security before selling the attached property (there was an appeal to the Privy Council), failed to furnish that security, and the execution case was struck off, it was held that the effect of that order was to leave intact all the proceedings which had been taken up to that stage. The act of the Court meant that, as the decree-holder was unable to furnish security, it was impossible for the Court to proceed further, and therefore the case was removed from the list of business which required immediate attention and action on the part of the Court—*Soondur Sinyh* vs. *Mussamut Bahooria Alum Bashee Koer*, 24 W. R., 36.

Effect of removal of attachment on alienation made during its continuance.—In the case of *Lalla Juggut Narain* vs. *Tulsiram*, 10 W. R, 99; 1 B. L. R., 71, it was held that an alienation made during the continuance of an attachment in execution of decree obtained *ex-parte*, was a valid alienation as soon as the attachment was declared to be a bad attachment by the cancelment of the *ex-parte* decree, and the rehearing of the suit on the ground that that decree had been improperly obtained—*Ram Churn Lall* vs. *Jhuboo Shahoo*, 14 W R, 25; 12 B. L. R., 418, *note*; but where there is no fatal objection to the decree the removal of an attachment would not operate to render an alienation made whilst attachment was subsisting a valid one, as it could not have a retrospective effect—*Maharajah Dheeraj Mahatab Chand Bahadoor* vs. *Shurno Moye Dossee*, 15 W R, 222; 12 B. L. R., 414, *note*; *Maharanee Indurjeet Kooer* vs. *Luchmun Singh*, 24 W. R., 56. In the case of *Puddomonee Dossee* vs. *Roy Mothooranath Chowdhry*, 20 W. R., 133; 12 B. L. R., 411, their Lordships of the Privy Council stated as follows: "It may, however, be argued that although a conveyance executed between the striking off of the first attachment and the issuing of the second may be valid, it does not follow that one executed whilst the first attachment was subsisting, becomes valid by relation, or ceases to be void as against the execution creditor and those who claim under him. That seems to be a point which is not touched by the authorities cited. Their Lordships, however, are of opinion that in this case Ras Monee Dossee cannot claim the benefit of any such rule, if it exists. Her case is peculiar. After the first execution was struck off, she became mortgagee. When the second attachment was taken out she intervened in the proceedings as an objector. The result was that the property was put up for sale as subject to her mortgage. She therefore bought only the equity of redemption, and presumably paid a smaller price than the property would have realised, if it had not been sold subject to her mortgage. She did not buy the subject which was originally attached, *viz.*, the whole property free of mortgage, but the mere equity of the redemption. She cannot be allowed to say that the original attachment ceased to be operative, so as to give her the power of acquiring the mortgage interest subject to which she has purchased, and yet to claim the benefit of it, in order to defeat conveyances which would unquestionably have been binding between the Sirkars, the judgment-debtors from whom she took her mortgage, and the respondents in this case, if there had been an end of the execution altogether. Their Lordships, moreover, are not prepared to say that in this case it would, under any circumstances, have been competent to the judgment-creditor, or any person claiming under him, to say that conveyances executed pending the first attachment were absolutely null and void. It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently shew that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained." So where the decree-holder submitted to the order of the Court requiring a fresh attachment to be issued, though he had applied for the sale of certain properties under an attachment, which he considered to be subsisting, it was held that, if the first attachment subsisted, the decree-holder should have contested the order for the second attachment by refusing to take it out and appealing against the order requiring it, and the rule laid down by the Privy Council was followed—*Matongines Dossee* vs. *Junmunjoy Chowdhry*, 25 W. R., 513.

Where execution was taken out in 1862 and not struck off till 1868, but it appeared that the delay was due to the creditor waiting long and patiently for her money, and being desirous to give the debtors every indulgence and opportunity of

repaying the debt, it was held that the presumption of abandonment did not arise—*Maharanee Inderjeet Koer* vs. *Luchmun Singh*, 24 W. R., 57.

Does an attachment, suspended or removed, revive so as to avoid all alienations on reversal of the order suspending or removing it.—Where property has been released from attachment in execution of them, and in a subsequent suit brought for the purpose, a decree is obtained, declaring it liable to be attached and sold in execution of the former decree, the effect of the decree in the latter suit is to set aside the order which released the property from attachment, thus leaving matters as they were before that order was passed—*Wooma Churn Chatterjee* vs. *Kadambini Debee*, 3 C. L. R., 146, and any alienation in the meantime would be made *pendente lite*—*Denendro Nath Sannyal* vs. *Ram Kumar Ghose*, I. L. R., 7 Cal., 107, so in the case of *Mahomed Warris* vs. *Pitamber Sen*, 21 W. R., 435, in which it was held that the effect of that decree must be to set aside the order of release which had been made, and therefore to make the property still subject to the attachment and to restore the state of things that had been disturbed by the order of release. See, however, *Krishna Chetty* vs. *Rami Chetty*, 8 Mad., 99. It has also been held that when an execution sale is set aside on account of irregularity in the proceedings, the attachment remains, so that the decree-holder can again bring it to sale—*Gossain Munraj Pooree* vs. *Deen Dyal Lall*, 20 W. R., 20.

Court may direct coin or currency-notes attached to be paid to party entitled

277. If the property attached is coin or currency-notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

This section applies to H. C. and M. S. C. C.

Investigation of claims to and objections to attachment of, attached property.

278. If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

Postponment of sale.

If the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

This section applies to H. C. and M. S. C. C.

Before any claim can be investigated under this section it is necessary to ascertain whether the claim of the intervenor is based on a right originating before or after the attachment made by the decree-holder—*Beebee Saheb Jehan* vs. *Syud Shaw Asudoollah*, 5 W. R., Mis., 28; the Judge should not refuse to make an enquiry under this section in a proper case, and he will be compelled by the High Court to do so—*Grish Chunder Lahooree* vs. *Kashessuree Debia*, 8 W. R., 26; *Mussamut Jumeela* vs. *Luchman Panday*, 4 C. L. R., 74.

Application of this section—This section does not affect attachments made under section 268, *ante*—*Hurilal Amthabhai* vs. *Abhesang Meru*, I. L. R., 4 Bom., 323. It only applies to claims which, if successful, would have the effect of releasing the property from attachment. Thus where the rights and interests of A in a certain mehal are attached, a claim by B to an undivided share in it should not be enter-

tained—*Nito Kalee Debee* vs. *Kripanath Roy*, 8 W. R., 358; see on this case—*Nga Tha Yah* vs. *Burn*, 11 W. R. (F. B.), 8; but where property belongs to A and B jointly, and in execution of a decree against A anything more than A's right and interest in the property is attached, B has a right to come in and claim that the attachment may be removed, *quoad* his share—*Raj Coomar Roy* vs. *Kadumbini Debia*, 4 B. L. R., 175; 13 W. R., 63; and the Court should investigate B's claim—*Issur Chunder Gangolly* vs. *Mohinee Mohun Doss*, 17 W. R., 74; no matter how B derives his title —*Hurish Chunder Roy* vs. *Brojo Soondur Mojoomdar*, 6 W. R., 164; or whether the property is moveable or immoveable—*Deanath Biswas* vs. *Issur Gine*, 14 W. R., 52; but the claim must be for property of which the judgment-debtor is said to be entitled to possession *in specie*, not, for instance, a debt due. Where a debt due from a third party to the judgment-debtor is attached in the hands of the party who owes it, the latter may either pay it into Court, or, if he objects for any reason to pay it, he may be ordered to pay it, unless such objection is founded on a *bonâ fide* ground of defence, when the Court may appoint a manager to sue for it. The debtor may then make any defence as in an ordinary suit, and is not affected by having had his plea wrongly tried and overruled under section 278—*Mussamut Rambutty Koer* vs. *Kamessur Prosad*, 22 W. R., 36. And where a mortgagee is in possession of the mortgaged property when it is attached in execution of a decree against the mortgagor, he can claim to have the attachment raised—*Kassirab Saheb Holkar* vs. *Vithaldas Mangulji*, 10 Bom., 100; though an equity of redemption may be sold in execution of a decree—*Srimati Saraswati Debi* vs. *Nabadwip Chandra Gosain*, 5 B. L. R., 380: but these two cases are hardly reconcileable. Where a suit resulted in two distinct orders for the payment of costs, one against the first set of defendants and another against the second, and the property of one of the former set was taken in execution of the order against the latter: *Held*, that the application of the aggrieved defendent for the release of his property fell within the provisions of section 246, Act VIII of 1859 (the section corresponding to the present one)—*Binode Lall Pokrashee* vs. *Gireedhur Chuckerbutty*, 22 W. R., 392: and see also *Gobind Pershad* vs. *Rajah Ram Purkash Singh*, 8 W. R., 378. Where in execution of a decree for a debt due by a deceased person, property in the hands of his representative is attached, a claim by the representative to have the property released on the ground that it is his own private property does not fall within this section, but within section 248, *ante*—*Wahed Ali* vs. *Mussamut Jumaee*, 18 W. R., 185; *Meer Mahomed Moruffer Hossein* vs. *Ameeroonissa Khatoon*, 12 B. L. R., 66; 20 W. R., 280; *Shurfun Bibee* vs. *Collector of Sarun*, 10 W. R., 199. It may be noticed that a judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly—*Damodhar Tuljaram*, 8 Bom., 177.

Attachment before Judgment.—By section 487, *post*, this section applies to attachment before judgment—see *Sava Ramji* vs. *Jadavji Nathu*, 2 Bom., 142; *Java Ramji* vs. *Jadavji Natha*, 1 Bom., 224; In re *Gocool Doss Soonderjee*, Bourke, 240; and *Kartick Chunder Mookerjee* vs. *Mookta Ram Sircar*, 10 W. R., 21. In this last case it was held that where a landlord, in a suit against his ryot for rent, attached before judgment certain growing crops under section 16, Act VI (B. C.) of 1862, the claim of an intervenor ought to be investigated in the same manner as if it were a claim made under section 246, Act VIII of 1859, to property attached in execution of a decree.

As if he was a party to the suit.—The words in Act VIII, 1859, were "as if the claimant had been originally made a defendant to the suit," and these words were stated by a Full Bench of the Calcutta High Court to mean "that the Court is to have the same powers of investigation as if the claimant was a party to a suit, which would give them power to summon the claimant and to dispose of the case against him, if he should refuse to attend"—*Nga Tha Yah* vs. *Burn*, 11 W. R., 8.

Where several persons, independently of one another, put in claims under section 278, and it appeared that they each claimed to be in possession of the same portion of the property under attachment, it was held that the Court was bound to try each claim separately as between the claimant and the decree-holder, and it should not have thrown out all the claims, because they were inconsistent with one another—*Sharoda Moyee Chowdhranee* vs. *Nobin Chunder Chowdhry*, 11 W. R., 255; 2 B. L. R., 333.

Where an objection has been made and disallowed, it cannot be renewed by the same person in the same attachment—*Khelat Chunder Ghose* vs. *Bhoggobutty Churn Mookerjee*, 14 W. R., 144. If in a previous attachment against the alleged representative of the judgment-debtor no objection has been raised to his responsibility as such representative, he cannot raise it on a subsequent attachment—*Maharjah Dheeraj Mahatab Chand Bahadoor* vs. *Mussamut Pearee Dossee*, 6 W. R., Mis., 61.

If the property has been bought during the pendency of a suit regarding it, it is subject to any attachment in execution of the decree, and no claim under section 278 would be admissible—*Rabia Khanum* vs. *Wise*, 23 W. R., 329.

The claimant in a case under section 278 should begin. The *onus* is on him to prove his claim, that the goods or property attached belonged to him, and were in his possession, and therefore not in that of the judgment-debtor. His evidence must be confined to his own claim, and not to establish the right of a third party—*Nga Tha Yah* vs. *Burn*, 11 W. R., 8; 2 B. L. R., 91.

Designedly or unnecessarily delayed.—It will be noticed that it is optional with a Court to allow a claim or objection to be made when there has been intentional delay in making it. Where a Court has refused or has neglected to adjudicate a claim, its order cannot act prejudicially to the claimant—*Roghoonath Doss Mohapattar* vs. *Bydonath Doss Maharatha*, 14 W. R., 364; *Jugobundhoo Bose* vs. *Sachya Bibee*, 16 W. R., 22; 8 B. L. R., App., 39; *Sah Mukhun Lall Panday* vs. *Sah Koondun Lall*, L. R., 2 Ind. App., 210; 24 W. R., 75; 15 B. L. R., 238.

Evidence to be adduced by claimant.

279. The claimant or objector must adduce evidence to shew that at the date of the attachment he had some interest in, or was possessed of, the property attached.

This section applies to H. C. and M. S. C. C.

Or was possessed of.—This section is not intended to be taken literally, but to be read with section 280. Thus the clause "or was possessed of" means was possessed of neither as trustee for the judgment-debtor nor as a tenant or other person paying rent to him.

The claimant comes into Court on the ground that at the date of the attachment the property was not capable of being attached as the property of the judgment-debtor. In order to have a *locus standi*, he must shew not only that the property was not that of the judgment-debtor, but that he, the claimant, had an interest in it. His position, therefore, is in every respect the same as that of a plaintiff in a suit in which the judgment-creditor would be defendant—*Nga Tha Yah* vs. *Burn*, 11 W. R., 8; and his application ought either be dismissed or numbered and registered as a suit—*Sahoo Gokul Pershad* vs. *Mussamut Zynub*, 1 Alla., 255. The *onus* is on him to prove his claim—*Gooroo Doss Roy* vs. *Sona Monee Dossia*, 20 W. R., 845; *Hurrish Chunder Chuckerbutty* vs. *Bhoobun Moyee Debea Chowdhrain*, 4 W. R., 99; by any kind of evidence sufficient for the purpose—*Binode Lall Pakrashee* vs. *Gireedhur Chuckerbutty*, 22 W. R., 392; and the Court is bound to receive the evidence offered in support of the claim—*Bhoiharinee Dabee* vs. *Maharajah Nil Mony Singh Deo Bahadur*, 24 W. R., 422; provided such claim be made at a proper time, *i. e.*, before sale—*Maharajah of Burdwan* vs. *Heeralall Seal*, 11 W. R., 54.

Release of property from attachment.

280. If upon the said investigation the Court is satisfied that, for the reason stated in the claim or objection, such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property wholly or to such extent as it thinks fit, from attachment.

This section applies to H. C. and M. S. C. C.

Where the Court is of opinion that the property attached ought not to be sold, the proper order for the Court to make is a simple order releasing the property from attachment. "It may be that the order of release is based on the fact that the Court considers it proved that the property belongs to the claimant, but nevertheless the order cannot, and certainly ought not to contain any declaration of the claimant's title as against the judgment-debtor"—*Bhyrub Lall Bhukut* vs. *Meer Abdool Hossein*, 8 W. R., 93; *Khelat Chunder Ghose* vs. *Bhuggobutty Churn Mookerjee*, 14 W. R., 144. If the claimant proves that the property attached was at the date of attachment wholly or partly his, an order should be passed releasing the property to that extent—*Jummal Ali* vs. *Tirbhee Lall Doss*, 12 W. R., 41; *Rajkoomar Roy* vs. *Kadambini Debia*, 5 B. L. R., 175; 13 W. R., 63; and that is the only order which should be passed—*Khellat Chunder Ghose* vs. *Gour Churn Mojoomdar*, 18 W. R., 402; *Misree Begum* vs. *Punnoo Singh*, 8 W. R., 362. When, under this section, property which has been attached is ordered to be released, the order for release is made with reference merely to the particular claimant who has obtained the order. The order is not to be looked on as a general decision (of which all the world can have the benefit) that the property does not belong to the judgment-debtor—*Mussamut Imam Bandee Begum* vs. *Mirza Mahomed Tukee Khan*, 8 W. R., 27.

Where the decree-holder states that the claimant is only the *benamedar* of the debtor, the Court is bound to enquire and find whether the property under attachment is or is not in the possession of the debtor or of some person in trust for him—In re *Hurree Hur Mookerjee*, 20 W. R., 202. So where a decree-holder sought to enforce his lien against certain mortgaged property, a third party intervened on the ground that he held under a *Ladaves* executed in his favor by the debtor, and the Judge found that the claimant was in possession not as the trustee of the debtor; *Held*, he should have released the property from attachment, leaving the decree-holder to enforce his lien against the party in possession by a regular suit—*Khelat Chunder Ghose* vs. *Gour Chunder Moojumdar*, 18 W. R., 402: and where the half share in certain property was attached in execution of a decree as belonging to the judgment-debtor, and a third party objected on the ground that out of that share two-eighths belonged to him and only one-eighth to the judgment-debtor, it was held that this claim was one that should have been investigated, and that if it were established that share should be released from attachment—*Kowar Rajcoomar Roy* vs. *Kadumbinee Dabia*, 13 W. R., 63; 4 B. L. R., 175. See also *Ishur Chunder Gangooly* vs. *Mohima Mohun Dass*, 17 W. R., 74.

Where A contracted to lay down a certain quantity of pavement for B, and, having carted paving stones to the works to the value of Rs. 100, received an advance of that sum from A, it was held that the stones should be released from attachment on B's intervention—*Small Cause Court Ref.*, 2 Alla., 337. A bought certain premises from the judgment-debtor, stipulating that if he should re-pay the sum with interest and also settle his general account with the firm, the premises should be re-conveyed. Possession was given to A. The premises were afterwards attached in execution of a decree, but were released, it being held that A was not in possession as trustee for the debtor—*Kassirav R. Saheb Holkar* vs. *Vithaldas Mangalji*, 10 Bom., 100.

This section does not apply.—This section does not apply to a claim made by a representative of the judgment-debtor in the suit. Where it was sought to execute a decree obtained against a person who had died since the date of the decree, by attaching certain immoveable property in the possession of the representative, and the latter claimed the property in his own right and not in his representative character. *Held*, the matter was one between parties to the suit, and should be determined under Act XXIII, 1861, section 11 (corresponding to section 244, *ante*—*Ameerunissa Khatoon* vs. *Meer Mozuffer Hossein Chowdhry*, 12 B. L. R., 65, overruling—*Hurrish Chunder Goopto* vs. *Shushee Malla Gooptia*, 15 W. R., 163; 6 B. L. R., 621; *Maharaja Dheeraj Mahatab Chand Bahadoor* vs. *Mussamut Pearee Dassee*, 6 W. R., 61, Mis.; and *J. B. Rainey* vs. *Ishur Chunder Bhuttacharjee*, 12 W. R., 333.

Disallowance of claim to release of property attached.

281 If the Court is satisfied that the property was, at the time it was attached, in possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some

other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

This section applies to H. C.

The proper order to make under this section is that the claim be disallowed—*Syud Wajid Hossein* vs. *Hafez Ahmed Rezah*, 17 W. R., 480; *Mohadeb Mundul* vs. *Modhoo Mundul*, 16 W. R., 59; and this order will be correct in cases where the claimant does not appear in support of his claim—*Tripoora Soonduree Debia* vs. *Ijjutoonissa Khatoon*, 24 W. R., 411; *Dhunput Singh* vs. *Indur Chunder Doogur*, 13 W. R., 121; or fails to produce any evidence—*Sreemunto Hazrah* vs. *Syud Tajjooddeen*, 21 W. R., 409; *Gooroo Doss Roy* vs. *Sona Monee Dossia*, 20 W. R., 345; as well as in cases where the claimant fails to produce evidence worthy of credit—*Lalla Goondur Lall* vs. *Hubeeboonissa*, 15 W. R., 311. In all these cases there is an adjudication and an order adverse to the claimant or objector which may make it necessary for him to sue to have it set aside—*Kaminee Debia* vs. *Ishur Chunder Roy Chowdhry*, 22 W. R., 39; *Brijo Kishore Nagh* vs. *Ram Dyal Bhudra*, 21 W. R., 133. An order passed under this section enures to the benefit of the person only in whose favour it is passed, *i. e.*, the attaching-creditor. Thus the judgment-debtor or persons claiming under him cannot set up as a bar that a claim made by their adversary for the release from attachment of the property in dispute, was dismissed as against a judgment-creditor who had attached it in execution of his decree—*Boolirooonissa Bibee* vs. *Kureemoonissa Bibee*, 21 W. R., 230; *Syud Wajid Hossein* vs. *Hafaz Ahmed Rezah*, 17 W. R., 480; *Gunga Narain Ghose* vs. *Hara Dhun Ghose*, 6 W. R., 157. And where the claimant is in actual possession the effect of an order disallowing his claim is that he is in possession without any title—*Brijo Kishore Nag* vs. *Ram Dyal Bhudra*, 21 W. R., 133; the fact that Government may have released certain lands from settlement in payment of revenue on the ground that they were appropriated to a religious endowment, does not exempt them permanently from being attached and sold in execution of a decree against the person who may hold them, if it be proved that he held them entirely for his own use—*Nimye Churn Pateetundee* vs. *Jogendro Nath Banerjee*, 21 W. R., 365.

Continuance of attachment subject to claim of incumbrancer.

282 If the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or lien.

This section applies to H. C. and M. S. C. C.

If property is sold subject to a mortgage and bought in by the mortgagee, the debt is satisfied if the value of the property is sufficient to cover the debt—*Dulichand* vs. *Ram Kissen Singh*, I. L. R., 7 Cal., 648.

Saving of suits to establish right to attached property.

283. The party against whom an order under section 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

This section applies to H. C. and M. S. C. C.

Conclusive.—An order striking off for want of prosecution an objection to the attachment of property, is not conclusive, and the objector may sue for damages for wrongful attachment without suing to establish the right he claimed in it—*Kallu Mal* vs. *Brown*, I. L. R., 3 Alla., 504.

Besides bringing a regular suit the party against whom the order is passed may apply for a review of the order—*Cochrane* vs. *Heera Lall Seal*, 7 W. R., 79; and the order granting the review will be final—*Bhyrub Chunder Surmah Chow-*

dhry vs. *Madhub Ram Surmah*, 20 W. R., 48. And where a claim is made and dismissed for default a fresh claim may be preferred—*Mahadeb Mundul* vs. *Modhoo Mundul*, 16 W. R., 59; but a fresh application, made after the previous one had been struck off at the instance of the claimant, was held to have been properly dismissed—*Gooroo Dass Roy* vs. *Kamala Kant Sen*, 20 W. R., 456; and a Judge has no jurisdiction to try a second time the same objector's claim under section 278, as against the same attachment, or to re-open a question finally decided on a former occasion—*Khelat Chunder Ghose* vs. *Bhuggobutty Churn Mookerjee*, 14 W. R., 144.

Appeal.—There is no appeal from an order dismissing a claim to attached property—*Shaikh Bukshee* vs. *Bungsheedhur*, 6 W. R., Mis., 46; or from an order releasing the property from attachment—Re *Ajoodhya Doss*, 12 W. R., 354; *Mittoo Lall* vs. *Mahtab Kooeree*, 19 W. R., 98; *Kartick Chunder Mookerjee* vs. *Mookta Ram Sircar*, 10 W. R., 21; *Radha Kishen* vs. *Shah Ameerooddeen*, 11 W. R., 204; *Sham Soondur Koonwar* vs. *Rughoonath Sahaye*, 11 W. R., 264, unless the claimant is the representative in interest of the judgment-debtor, and comes under section 244 clause (*e*) *ante*,—*Rash Beharry Mookerjee* vs. *Surnomoyie*, 9 C. L. R., 79. And where land is attached in execution of a rent-decree, and on an application made either under Act VIII of 1859, section 246, or Act X of 1859, section 106, it is released from attachment by order of a Court of competent jurisdiction, such order is not subject to appeal, and can only be impugned by a regular suit—*Urjoon Sahoy* vs. *Rajah Nil Mony Singh Deo*, 20 W. R., 90. Where, in execution of a decree against the judgment-debtor, a *shebait*, the property of the idol was attached, it was held that no appeal lay from an order rejecting an application made by the judgment-debtor to have the property released from attachment—*Nimaye Churn Puteetundee* vs. *Jogendro Nath Banerjee*, 21 W. R., 365; and so where the judgment-debtor claimed to hold property on account of an endowment, and the property was released, the fact that the objection was made by the judgment-debtor was considered unimportant and no appeal was allowed—*Shankar Dial* vs. *Amir Haidar*, I. L. R., 2 Alla., 752; but see *Bagubai* vs. *Kasai Sayad Nizmuddin*, 6 Bom., 205, where an appeal was granted from an order releasing property from attachment at the instance of the judgment-debtor who had alleged that the property belonged to an idol and that he was only manager. Where an order has been passed under section 280, 281 or 282, the High Court will not interfere under section 15 of the High Courts, Act 24 and 25 Vict., c. 104—*Dhunput Singh* vs. *Indur Chunder Doogur*, 13 W. R., 121; but see *Khelat Chunder Ghose* vs. *Gour Churn Mojoomdar*, 18 W. R., 402.

Suit to establish right.—The effect of this section is to exclude a party to an investigation under section 280, 281 or 282, from any other remedy than that expressly provided for him by this section—*Settiappan* vs. *Sarat Singh*, 3 Mad., 220. The party against whom an order is passed under the previous sections must, if he sue, assert substantially the same right as that which has been contended for in execution—*Colvin, Cowie & Co.* vs. *Elias*, 2 B. L. R., 212; 11 W. R., 40; thus the decree-holder may sue to have his right to attach and sell the property declared—*Durgaram Bhuttacharjia* vs. *Joyram*, 1 Shome, 20; and a claimant may bring a suit or to establish his right; but not to set the order aside—*Kolasherri Illath Narainan* vs. *Kolasherri*, I. L. R., 4 Mad., 131. The Judge is bound to find facts upon the evidence tendered and taken in the case, and not upon any evidence taken in the summary cause—*Lekhraj Roy* vs. *Mutty Madhub Sen*, 14 W. R., 95. Every suit brought under this section must bear a stamp according to the value of the property—*Muftee Jellaloodden Mahomed* vs. *Shaharoollah*, 22 W. R., 422; 15 B. L. R., App., 1; *Bohuroonnissa Bibee* vs. *Kureemoonnissa Bibee*, 19 W. R., 18; but see *Motichand Jaichand* vs. *Dadabhai Pestanji*, 11 Bom., 186. For remarks on the scope of this section, see *Rango Vithal* vs. *Rikhivadas* bin *Rayachand*, 11 Bom., 174; and *Bank of Hindustan* vs. *Prem Chand Raichand*, 5 Bom., 83, 93; *Sheikh Eida* vs. *Ram Jug Panday*, 19 W. R., 289.

Where the regular suit is brought by the intervenor, the onus is on him to prove his title—11 W. R., 454; *Nathu Sadashiv* vs. *Ramchundra Annaji*, 5 Bom., 76; *Syud Abdool Huq* vs. *Syud Ambur Ali*, 8 W. R., 422; *Mohima Chunder Koondoo* vs. *Noorooddeen*, 11 W. R., 422; *Sreenarain Chukerbutty* vs. *Miller*, 15 W. R., 7; but where property in the possession of the attaching creditor at the date of attachment, was released from attachment at the instance of an intervenor, but allowed to remain in the creditor's possession, held, in a subsequent suit by the intervenor (which was not a suit under this section) that the plaintiff must prove

his title—*Baboo Madhoo Pershad* vs. *Durga Pershad*, 7 Alla., 85. He should be prepared to prove that the claim which he puts forward and is seeking to have declared has been investigated and disallowed ; that it is still in existence ; that it has been infringed ; and that he is seeking compensation or to recover possession—*Amjud Ali* vs. *Kunkoo Shaw*, 17 W. R., 304 ; *Mahomed Gazee Chowdry* vs. *Shamboonath Misser*, 22 W. R., 389. He should prove purchase and subsequent dispossession, where these are the grounds of his claim—*Tulsee Monee Dossee* vs. *Peary Mohun Baboo*, 25 W. R., 79. Where he shews that a deed of sale has been executed in his favour by the judgment-debtor, and that consideration money has passed and possession has been given him, he starts his case sufficiently ; if the defendant alleges, notwithstanding, that the sale was collusive and fictitious, it is for him to shew that it was so—*Digumburee Dossee* vs. *Banee Madhub Ghose*, 15 W. R., 155. Where the certified purchaser of property, which had been a second time attached and sold in execution of a decree as the property of the judgment debtors, sued to be confirmed in possession of the property by virtue of his certificate of sale, and to obtain the cancelment of the second sale and of the order disallowing his objection. *Held*, on an objection being made that his purchase was *benamee* for the judgment-debtor, that the certificate of sale was not conclusive evidence that his purchase was exclusively for his own benefit—*Gunesh Parshad* vs. *Sheo Churn Lall*, 6 Alla., 197. It is sufficient if he proves that he has been in peaceable possession for more than twelve years previous to the institution of the suit—*Nuffer Dass* vs. *Nil Madhub Patro*, 11 W. R., 467 ; and his suit should not be dismissed merely on the ground that he failed to shew he was in possession at the institution of the suit—*Mathura Panday* vs. *Ram Ruch Ya Tewari*, 3 B. L. R., 108 ; 11 W. R., 482 ; though, no doubt, that is an important question in the case—*Toofanee Doss* vs. *Mun Rakhun Roy*, 15 W. R., 202. When the intervenor brings a regular suit under this section, an injunction to stay the execution proceedings should not be granted if prayed for. The proper course is for the intervenor to present a petition in the execution case, representing that he had brought a suit and praying for a postponement of the sale—*Roy Luchmeeput Singh Bahadoor* vs. *The Secretary of State*, 20 W. R., 11 ; and such a petition should be acceded to—*Doorga Churn Chatterjee* vs. *Ashootosh Dutt*, 24 W. R., 70. Where the intervenor claims the property sold in execution as his own exclusive property, he should make the decree-holder a party to the suit, because the object of the suit is to restore all parties to the position which they occupied previously to the attachment and sale—*Bank of Hindustan* vs. *Premchand Raichand*, 5 Bom., 83.

In a suit by an execution creditor to establish the title of his judgment-debtor to certain property which has been released from attachment on a claim preferred by an intervenor, the latter has no right to set up any irregularities in the execution proceedings in answer to the execution-creditor's title—*Tofail Ahmud* vs. *Banee Madhub Mookerjee*, 24 W. R., 394. And where the attaching creditor brought a suit and obtained a decree establishing his right of attachment, it was held that the effect of that decree was to set aside the order of release and to restore the state of things which it had disturbed—*Mahomed Warris* vs. *Pitambur Sen*, 21 W. R., 435 ; and that an application for execution, made after having obtained the decree, is, whatever be its form, in substance one for the continuation of the former proceedings, and is not, therefore, an application to execute a decree within the meaning of Act IX of 1871, Sch. II., Art. 167 (see Act XV of 1877, Sch. II., Art. 179)—*Booboo Pyaroo Tuhobildarinee* vs. *Syud Nazir Hossein*, 23 W. R., 183 ; otherwise in Madras—*Krishna Chetty* vs. *Rama Chetty*, 8 Mad., 99. Where the same property is attached in execution of different decrees, and all the attachments are removed, it is not necessary for each attaching creditor to bring a separate suit. A decree obtained in a suit brought by one enures to the benefit of all—*Chintamonee Sein* vs. *Issur Chunder Chunder*, 12 W. R., 221.

A regular suit by an intervenor will not lie, under this section, for the purpose of establishing that the interest of a judgment-debtor which was put up for sale was that of a tenant only and not that of an usufructuary mortgagee—*Amjud Ali* vs. *Konkoo Shaw*, 9 Ben. App., 28 ; 17 W. R., 304. And where a regular suit was dismissed which was brought under section 246, Act VIII of 1859, by an intervenor in possession whose claim under that section had been disallowed, and a subsequent suit against the intervenor for possession was brought by the execution-purchaser, the fact that the intervenor had been more than twelve years in possession prior to the institution of this last mentioned suit was held to be a good defence —*Shridhur Vinayak* vs. *Babaji* bin *Jivaji*, 6 Bom., 220.

For the nature of suits brought under this section, the amount of stamp duty required, and their valuation for purposes of jurisdiction, see—*Dayachand Nemchand* vs. *Hemchand Dhdramchand*, I. L. R., 4 Bom., 515 ; *Narainrao* vs. *Balkrishna*, I. L. R.,

4 Bom., 529; *Kolasherri Illath* vs. *Kolasherri*, I. L. R., 4 Mad., 131; *Gulzari Mal* vs. *Jadaun Rai*, I. L. R., 2 Alla., 63, 799; *Ram Prasad* vs. *Sukh Dai*, I. L. R., 2 Alla., 720; *Krishnama Chariar* vs. *Sreneoasa*, I. L. R., 4 Mad., 339.

Small Cause Courts.—Whether a party is to sue in the Civil Court or the Small Cause Court depends upon the nature of his claim and the right he seeks to enforce. A person whose goods have been illegally sold in execution may bring a suit in the Small Cause Court to recover them—*Shib Narain Singh* vs. *Madenally*, 9 C. L. R., 8; I. L. R., 7 Cal., 608; but where a decree-holder seeks to obtain a declaration that certain property is liable to attachment in execution of his decree must go to the Civil Court, I. L. R., 7 Cal., 608; *Akbarali* vs. *Jezuddin*, I. L. R., 8 Cal., 399; *Chhaganal Nagardas* vs. *Jeshan Dass*, I. L. R., 4 Bom., 503.

Limitation.—A person against whom an order is passed under section 280, 281 or 282, *ante*, must bring his suit to establish his right within one year from the date of the order—Limitation Act, 1877, Sch. II., Art. 11; otherwise, the order will be final and conclusive, and a regular suit will be barred—*Shiboo Narain Singh* vs. *Mudden Ally*, I. L. R., 7 Cal., 608, if brought by the attaching creditor—*Juggoo Lall Upadhya* vs. *Mussamut Ekbaloonissa*, 7 W. R., 456; or by the judgment-debtor —*Netictom Perengaryprom* vs. *Tayanbarry Parameshwaren Nambudry*, 4 Mad., 472; or by the intervenor, whether in possession or not—*Brojo Kishore Nag* vs. *Ram Dyal Bhudra*, 21 W. R., 133; *Shaik Khoda Buksh* vs. *Purmonund Dutt*, 5 W. R., 214; and whether any evidence has been given or not before disallowing the claim—*Lalla Goondur Lall* vs. *Hubeeboonissa*, 15 W. R., 311; *Gooroo Doss Roy* vs. *Sona Monee Dossia*, 20 W. R., 344; *Kaminee Debia* vs. *Issur Chunder Roy Chowdhry*, 22 W. R., 39; see also *Rughoonath Pershad* vs. *Surjoo Pershad Singh*, 22 W. R., 162; *Settiapan* vs. *Sarat Singh*, 3 Mad., 220.

The limitation of one year will not apply where there has been no investigation under section 280, 281 or 282—*Sah Makhun Lall Panday* vs. *Sah Koondun Lall*, L. R., 2 Ind. App., 210; 15 B. L. R., 228; *Lalla Beharee Lal* vs. *Lalla Modhu Pershad*, 6 W. R., 69; even though the property may have been released—*Jugobundhoo Bose* vs. *Sachya Bibee*, 16 W. R., 22; 8 Ben. App., 39; *Sreemutty Dossee* vs. *Sheebanee Debia*, 5 W. R., 123; *Syed Mahomed Afzul* vs. *Kanhya Lall*, 2 W. R., 263; nor where there has been no order made under those sections—*Baboo Judonath Chowdhry* vs. *Radhamonee Dossee*, 7 W. R., 256; *Radhanath Banerjee* vs. *Jodoonath Singh*, 7 W. R., 441; *Wazeer Jemadar* vs. *Noor Ali*, 12 W. R., 33; *Ram Surun Singh* vs. *Mahomed Ameer*, 13 W. R., 78; *Kamessur Pershad* vs. *Kadir Khan*, 20 W. R., 393; *Rutnessur Koondoo* vs. *Majida Bibee*, 7 W. R., 252; nor, where a proper order has not been made—*Monohur Khan* vs. *Troyluckonath Ghose*, 4 W. R., 35; *Mussamut Kamran* vs. *Neit Ram*, 6 Alla., 188; *Luckhee Prea Debia* vs. *Khyroollah Kazee*, 14 W. R., 367; nor, where an order has been passed without jurisdiction—*Lala Gundar Lal* vs. *Habibannissa*, 7 B. L. R., 235.

As to the limitation under Act IX of 1871, which differs from the present Act, see *Krishnaji Vithal* vs. *Bhaskur Rangnath*, I. L. R., 4 Bom., 611.

It has been held that the limitation of one year does not apply to a suit by the judgment-debtor against the intervenor—*Nitta Kolita* vs. *Bishnuram Kolita*, 2 B. L. R., App., 49, especially when the judgment-debtor charged that the successful intervenor was his mortgagee in possession—*Cheriyarakel* vs. *Vayaka Parambath Imbichi Ammah*, 6 Mad., 416; nor to a suit by one attaching creditor against another who, having obtained a decree against an intervenor declaring that the property released was that of the judgment-debtor, executed his decree and bought the property—*Chintamani Sen* vs. *Iswar Chandra*, 3 B. L. R., App., 122; nor, to a suit by a person who comes in too late to be made a party to the proceedings under section 280, 281 or 282—*Raghoonath Doss Mohapattur* vs. *Bydonath Doss Maharatha*, 14 W. R., 364; nor to a suit between rival claimants—*Doorgaram Roy* vs. *Raj Nuro Sing Deb*, 11 W. R., 134.

A minor is not bound by the one year's limitation—*Sheekh Khoda Box* vs. *Budri Narain Singh*, 8 C. L. R., 306, he may bring a suit under this section within one year of attaining his majority. See Limitation Act, 1877, section 7—*Phoolbas Koonwur* vs. *Jogessur Lall Sahoy*, I. L. R., 1 Cal., 226; L. R., 3 Ind. App., 7.

Power to order property attached to be sold, and proceeds to be paid to person entitled.

284. Any Court may order that any property which has been attached, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the pro-

ceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

A judgment-debtor applied to have certain property attached in execution sold in successive shares. The Judge refused the application. *Held*, the debtor could appeal under section 588 (*j*) Act X of 1877—*Chandhari Singh* vs. *Jhumah Singh*, 4 C. L. R., 27; *Harbunns Sahai* vs. *Bhairo Prasad*, I. L. R., 5 Cal., 259.

This section applies to H. C. and also to M. S. C. C., as far as it relates to moveable property.

Property attached in execution of decrees of several Courts.

285. Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof, shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached,

This section does not render a sale under a second attachment invalid, even if the decree-holder is purchaser—*Obhoy Churn Coondoo* vs. *Golam Ali*, I. L. R., 7 Cal., 410.

This section has no reference to the sections of the code relating to the sale and delivery of property—*Chunni Lal* vs. *Debi Pershad*, I. L. R., 3 Alla., 356; and it is doubtful.

Whether it refers to immoveable property—*Obhoy Churn Coondoo* vs. *Golam Ali*, I. L. R., 7 Cal., 410.

The Court referred to in this section has the sole power of deciding objections to the attachment, of determining claims made to the property, of ordering the sale thereof and receiving the sale proceeds, and of providing for their distribution under section 295—*Badri Prasad* vs. *Saran Lal*, I. L. R., 4 Alla., 359.

G.—Of Sale and Delivery of Property.

(a) General Rules.

Sales by whom conducted and how made.

286. Sales in execution of decrees shall be conducted by an officer of the Court or by any other person whom the Court may appoint, and, except as provided in section 296, shall be made by public auction in manner hereinafter mentioned.

This section applies to H. C. and M. S. C. C.

In execution of decrees.—Sale under decrees passed without jurisdiction and afterwards set aside on that account are null and void—*Jadu Nath Kundu Chowdhry* vs. *Brija Nath Kundu*, 6 B. L. R., App., 90; and so are sales under decrees barred by limitation—*Golam Asgar* vs. *Lakhimani Debi*, 5 B. L. R., 68. (But a separate suit to prove the decree was barred at the time of sale will not lie—*Nojabut Ali Chowdhry* vs. *Moha Buseeroolah Chowdhry*, 11 B. L. R., 42.) See note under section 297, *post*.

The words "whom the Court may appoint" apply not only to the words "any other person," but also to the "officer of the Court;" otherwise any officer might, without any authority take upon himself to sell property in execution. Thus if, in the absence of a Subordinate Judge, a District Judge were to carry on a sale, it would be set aside without proof of substantial injury—*Judoonath Roy* vs. *Ram*

Baksh Chatterjee, 12 W. R., 238; but where a Munsif absent through illness, empowered his peshkar to carry on a sale, the sale was upheld; there was no proof of substantial injury—*Omur Chunder Dass* vs. *Soor Mooniar Khatoon*, W. R., 1864, p. 44.

The fact that a creditor and his attorney have directed the Sheriff to seize property does make the latter the creditors' agent for the purpose of selling it—*Dorab Ally Khan* vs. *Khajah Moheeoodden*, I. L. R., 3 Cal., 806; I. L. R., 6 Cal., 356.

A sale under section 296 is permissive and not obligatory—*Luchmeeput* vs. *Lekraj Roy*, 8 W. R., 415.

Proclamation of sales by public auction.

287. When any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify as fairly and accurately as possible—

(*a*) the property to be sold;

The sale of a decree for possession of land does not carry the mesne profits due to the debtor—*Gunesh Lal Tewari*, I. L. R., 6 Cal., 213, and the sale of a decree partly executed only enables the purchaser to execute what remains to be carried out—*Grish Chunder Chuckerbutty* vs. *Jibaneswari Debia*, I. L. R., 6 Cal., 243.

If a Court directs the sale of property not warranted by the decree, the sale may be set aside in a regular suit—*Assamathemenssa Bibee* vs. *Roy Luchmeput Singh*, I. L. R., 4 Cal., 142; *Dorab Ally Khan* vs. *The Executors of Khajah Moheeooddeen*, I. L. R., 3 Cal., 806. And if the sale proclamation asserts an interest in the judgment-debtor which does not exist, the purchaser can follow the money into the hands of the Sheriff, or even the execution creditor if the money has been paid to him—*Framji Besanji Dustur* vs. *Hormasji*, I. L. R., 2 Bom., 258.

If the property of which sale is sought is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence, or otherwise, of the debt, and, if it comes to the conclusion that no debt exists should abstain from proceeding to a sale—*Hari Lal Amthabhai* vs. *Achesang Meru*, I. L. R., 4 Bom., 323.

If is only in cases where it is manifest that the judgment-debtor must have been sued as a representative, that the Court has allowed a sale, in terms of the interests of the judgment-debtor, to convey the interests of others apparently not parties to the suit. Except where the person contesting the sale was bound to pay the debt for which the decree was passed—*Loki Mahton* vs. *Ajaib Lal*, 4 C. L. R., 465 and cases there cited.

(*b*) the revenue assessed upon the estate or part of the estate, when the property to be sold is an interest in an estate or a part of an estate paying revenue to Government;

(*c*) any incumbrance to which the property is liable;

In the case of a mortgage the amount of the mortgage debt unpaid should be stated—*Mohunt Megh Lall* vs. *Shib Pershed Madi*, I. L. R., 7 Cal., 41. As to the effect of stating in the sale notice a larger sum there is due on a mortgage, see *Seth Gokul Dass* vs. *Murli*, I. L. R., 3 Cal., 602.

A decree ordering certain property named in it to be sold, gives a lien on it—*Sooraj Buksh* vs. *Ramjeawun*, 4 Alla., 5; a money decree on a mortgage bond does not—*Radha Kant Roy* vs. *Mirza Sudafut Mahomed Khan*, 21 W. R., 86.

(*d*) the amount for the recovery of which the sale is ordered; and

(*e*) every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property.

For the purpose of ascertaining the matters so to be specified, the Court may summon any person whom it thinks

necessary, and examine him in respect to any such matters, and require him to produce any document in his possession or power relating thereto.

Rules to be made by High Court.

The High Court shall, as soon as may be after this Code comes into force, make rules for the guidance of the Courts in exercise of their duties under this section. The High Court may from time to time alter any rules so made. All such rules shall be published in the local official Gazette and shall thereupon have the force of law. As regards his own Court and the Court of Small Causes at Rangoon, the Recorder of Rangoon shall be deemed to be a "High Court" within the meaning of this paragraph.

Nothing in this section shall apply to cases in which the execution of the decree has been transferred to the Collector.

This section applies to H. C. and M. S. C. C.

The sales contemplated by this section are sales in execution of decrees, and the procedure and the rules laid down regarding them are framed on the assumption that the property to be sold has been already attached—*Denonauth Ruckit* vs. *Mutty Lall Paul*, 1 Hyde, 158; and that property not attached and not proclaimed cannot be sold—*Ram Onoogroho Singh* vs. *Mussamut Montorun*, 6 W. R., 223.

Proclamation.—The object of issuing a proclamation is to give notice to intending purchasers, and not to the judgment-debtor—*Laek Ram* vs. *Mohesh Doss*, 12 W. R., 488; to inform them of what is to be sold and the names of the parties whose right, title and interest in it are to be sold, and parties present at the sale are not bound to go behind it, and cannot be fastened with knowledge of the contents of the decree—*Shaikh Abdool Kureem* vs. *Syud Jaun Ali*, 18 W. R., 56, dissenting from the following passage in *Ishan Chunder Mitter* vs. *Buksh Ali Soudagur*, Marsh., 614: "If the parties who went to that auction had referred to the decree they would have found that the debt for which the sale was to take place was not the widow's but Juggomohun's, and that the property to be sold under the decree was not the widow's but Juggomohun's, because Juggomohun was really the debtor, and the widow was sued merely in her representative character;" but in a later case another Bench refused to follow the decision in the 18th volume of the W. R., and declared that the decision in Marshall's reports was good law—*Mussamut Nuseerun* vs. *Moulvie Ameeruddeen*, 24 W. R., 3. And where on an execution sale there is a discrepancy between the conditions of the proclamation of what is to be sold, and the certificate of what has been sold, the High Court at Calcutta has held that the conditions of the proclamation are to be taken of superior authority in dealing with the claims of innocent third parties whose rights are affected by the variation—*Uma Churn Sen* vs. *Gobind Chunder Mozumdar*, 1 C. L. R., 460. See, however, *Seth Gokul Dass* vs. *Murli*, I. L. R., 3 Cal., 602, and the cases under section 316, *post*.

The proclamation should be written in the language of the Court from which it issues, instead of the current language of the country, as was the case under the old Code—*Mohun Lall* vs. *Sheikh Ali Buksh*, S. D., N. W., 1856, p. 585; and should specify the details given in this section; for an omission may form a ground for cancelling the sale, in case any substantial injury has ensued; otherwise not. Thus the omission of the jumma and the name of the decree-holder in the proclamation does not vitiate a sale unless the debtor has suffered loss—*Bhood Singh* vs. *Gouree Mull*, S. D., N. W., 1860, p. 533; and where, on the application of the same decree-holders in five separate cases, the entire right of all the sharers in common property was sold, and the proclamation did not specify the rights of each judgment-debtor or his liability in each case, but no injury ensued, the sale was upheld—*Thakoor Dass* vs. *Hurdeo*, S. D., N. W., 1862, p. 15; and so if two lots are sold as one lot, though the proclamation may have treated them as separate—*Nundeeput Mohta* vs. *Urquhart*, 13 W. R., 209, or if the proclamation does not specify the numbers, values, &c., of promissory notes sold, the sale will not be set aside except on proof of substantial injury—*Luchmeeput* vs. *Lekraj Roy*, 8 W. R., 415.

Where the holder of two decrees attaches property in execution of one of the decrees, he has a right to state in the sale proclamation that he also claims the same property is liable to sale in satisfaction of his second decree—*Balakee Lall* vs. *Khuruckdharee Singh*, 12 W. R., 79.

Part of an Estate.—The "part of an estate" means the "aliquot part of an estate"—*Kally Prosonno Bose* vs. *Dinonath Mullick*, 11 B. L. R., 56.

Time and Place of Sale.—The proclamation should fix a day for the sale which is not a fixed holiday, or a day in which the Courts are closed by order of the High Court, for on these days a sale is illegal—*Jadub Chunder Haldar* vs. *Haro Jemadar*, 3 W.R., Mis., 24: and no sale can take place before that date—*Jhoomuck Chowdhry* vs. *Rajah Radha Pershad Singh*, 25 W. R., 328. If a portion of the property is released to a third party after proclamation.—*Shib Prokash Singh* vs. *Sardar Doyal Singh*, I. L. R., 3 Cal., 544 or if the sale does not occur on the fixed day and a postponement is necessary, then the general rule is that a new proclamation should issue, for *primâ facie*, a sale without being duly proclaimed is injurious to the debtor—*Sanwul Singh* vs. *Makhun Panday*, 2 Alla., 143. If the postponement has been an indefinite postponement—*Okhoy Chunder Datt* vs. *Erskine & Co.*, 3 W. R., Mis., 11; or, if the sale should take place on the day originally fixed, after the order of postponement has passed—*Tekait Jai* vs. *Mirza Bandeh*, S. D., N. W., 1856, 322; or on any day before the date to which it is postponed—*Joohmuck Chowdhry* vs. *Radha Pershad Singh*, 25 W. R., 328, and the debtor has not by his conduct or agreement stopped himself from objecting to the irregularity—*Nooral Hossain* vs. *Mussamut Omatool Fatima*, 25 W. R., 34; *Hurdeo Narain Sahoo* vs. *Girdharee Singh*, 19 W. R., 227, a new proclamation must issue; and an agreement to postpone for one month will not justify a sale several weeks after, without a new proclamation —*Shoshee Mookhee Burmonia* vs. *Dwarkanath Biswas*, 6 W. R., 84. See however *Beshen Dyal Singh* vs. *Khudeemun*, W. R., 1864, p. 359. But if the postponement is only for one day and made in open Court—*Roy Gowree Nath Sahoy* vs. *Shah Fakeer Chund*, 18 W. R., 347, (see however *Harbuns Sahai* vs. *Bhairo Pershad*, I. L. R., 5 Cal., 259,) the sale will be upheld though no proclamation has issued, unless the debtor proves that he has suffered injury—*Asumtoonnissa Bibee* vs. *Khudemoonissa Bibee*, 17, W. R., 278.

Each case must be decided on the particular facts established, but if the price obtained is very inadequate, and there has been some material irregularity in the sale proceedings, the Courts are inclined to connect one with the other, and to presume that the substantial inquiry has been the result of the irregularity—*Gopee Nath Drbay* vs. *Roy Luchmeput Singh*, I. L. R., 3 Cal., 542; *Kalytara Chowdhrain*, I. L. R., 7 Cal., 466. See however—*Olpherts* vs. *Mahabir*, P. C., November, 24th 1882.

Indemnity of Judges, &c.

288. No Judge or other public officer shall be answerable for any error, misstatement or omission in any proclamation under section 287, unless the same has been committed or made dishonestly.

This section is new. It applies to H. C. and M. S. C. C.

Mode of making proclamation.

289. The proclamation shall be made, in manner prescribed by section 274, on the spot where the property is attached, and a copy thereof shall then be fixed up in the court-house and, in the case of land paying revenue to Government, also in the Collector's office.

If the Court so direct, such proclamation shall also be published in the local official Gazette and in some local newspaper, and the costs of such publication shall be deemed to be costs of the sale.

This section applies to H. C. and M. S. C. C.

This section removes the difficulty pointed out in the case of *Kisto Kishore Ghose* vs. *Soorjonath Sircar*, 10 W. R., 354.

Shall then be fixed up.—This shews that the proclamation and copy fixed up in the Court-house must be made and attached subsequently to that made under section 274, as decided in the case of *Mohunt Megh Lall* vs. *Shib Pershad*, I. L. R., 7 Cal., 34.

Time of sale.

290. Except in the case of property mentioned in the proviso to section 269, no sale under this Chapter shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been fixed up in the court-house of the Judge ordering the sale.

This section applies to H.C. and M. S. C. C.

Consent.—An application made, on the day of sale by the judgment-debtor that a part only of his property should be sold instead of the entirety is not a consent under this section—*Harbans Sahai* vs. *Bhairo Pershad*, I. L. R., 5 Cal., 259.

An order under this section may be set aside under section 622, *post*—*Bhekraj Koeri* vs. *Gendh Lal Tewari*, I. L. R., 5 Cal., 878.

Power to adjourn sale.

291. The Court may in its discretion adjourn any sale under this chapter (other than a sale by the Collector) to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment: provided that when the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court. Whenever a sale is adjourned under this section for a longer period than seven days, a fresh proclamation under section 289 shall be made, unless the judgment-debtor consents to waive it. Every such sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to such officer, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale.

Stoppage of sale on tender of debt and costs, or on proof of payment.

This section applies to H. C. and M. S. C. C.

Sales under the Rent Law should be conducted in the manner prescribed in this chapter—*Grish Chunder Ghose* vs. *Kalee Tara*, 25 W. R., 395. There is no rule of law compelling the selling officer to close the auction on the first day. It is left to his judgment to do as he thinks best, and much will depend on the nature of the property and the circumstances of the sale. On the other hand, he is not bound to refuse closing the sale, because a person has sent him notice to say that he was ready to make a higher bid—*Gobind Hari Valekar* vs. *Bank of India*, 4 Bom., 164. See note to section 311, *post*, as to irregularities in conducting a sale.

Postponement.—A postponement should not be allowed unless there is some reason to believe that it will be beneficial to the judgment-debtor, and the Court is satisfied that by the postponement he will be in a position to satisfy the demand, or the immediate sale is likely to be attended with ruinous or unduly injurious consequences to the judgment-debtor.

and the postponement will not seriously prejudice the decree-holder—*Janokeenath Mookerjee* vs. *Radha Mohun Chatterjee*, 20 W. R., 130; and the general rule is that Courts will not interfere by ordering a stay of judicial proceedings unless serious injury will ensue to the party applying in case the stay of proceedings is not granted, and unless the party has come promptly to make the application—*Nawab Sidhee Nuzur Ally Khan* vs *Rajah Ojoodhyaram Khan*, 10 Moore, 327. Where a debtor prayed that the sale of his property might be stayed, on the ground that the day fixed for the sale was near the last day for the payment of Government revenue, the application was allowed—Re *Ahmed Reza*, 13 W. R., 281; but where a decree-holder on the day of sale presented a petition, stating that the judgment-debtor had promised to execute a private sale of the property, but had not, and asked the Court to confirm him in possession, it was held that the Judge was right in refusing to stop the sale—*Venkatu Narasimha Apparow Naidu* vs. *Venkatakristnia*, 5 Mad., 410. As to whether a new proclamation should issue, see note under section 287, *ante*.

A District Judge cannot order a Subordinate Judge to postpone a sale in a case pending before the Court of the latter officer—*Jaishee Ram* vs. *Mussamut Bijai Kooer*, 5 Alla., 177.

A payment made to prevent a sale in execution is not voluntary payment whether made by the debtor or a third party claiming the property—*Omrito Lall Sircar* vs. *Ramdhun Chakee*, 18 W. R., 503; *Fatima Khatoon Chowdrain* vs. *Mahomed Jan Chowdhry*, 12 Moore, 64; Act IX, 1872, section 69.

A public officer executing the process of a court can not under colour of that process do at a sale what the process does not authorise him to do for the purpose of carrying out a contract between the execution creditor and a third party—*Moher* vs. *O'Grady*, 4 L. R., Ir., 54.

Officers concerned in execution sales not to bid for or buy property sold.

292. No officer having any duty to perform in connection with any sale under this chapter shall either directly or indirectly bid for, acquire or attempt to acquire, any interest in any property sold at such sale.

This section is new. It applies to H. C. and M. S. C. C.

This would prevent pleaders who have any duty to perform in connection with a sale from purchasing property sold in execution of decrees, but not the purchase of the decree itself by a pleader from his client—*Goshain Jug Roop Geer* vs. *Chingun Lall*, 2 Alla., 46. A pleader purchasing under this section would be liable to be punished under Act XX of 1865, and the debtor might elect either to have the sale set aside or treat him as his agent. As to the previous law, see *Veerapah Chetty* vs. *Aga Syud Abdul Hossein*, 14 W. R., 405; *Roy Nundiput Mahta* vs. *Urquhart*, 13 W. R., 209.

Defaulting purchaser answerable for loss by re-sale.

293. The deficiency of price (if any) which may happen on a re-sale under this Code by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court by the officer holding the sale,

and shall, at the instance of either the judgment-creditor or the judgment-debtor, be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money.

This section applies to H. C. and M. S. C. C. in part.

This section extends to all sales, whether of moveable or immoveable property, and also to re-sales made under the code whether made in consequence of default of payment of deposit under section 306, or of the purchase money under sections 307 and 308, *post*—*Savherbhai* vs. *Haribhai*, I. L. R., 5 Bom., 575; *Ramdhani Sahai* vs. *Rajrâni Kooer*, I. L. R., 7 Cal., 337.

Deficiency of price.—The purchaser is liable for the deficiency of price and the expenses of the re-sale, and no more—*Sree Narain Mitter* vs. *Mahtab Chunder Bahadoor*, 3 W. R., 3; he is not bound to pay interest—*Soorj Buksh Sing* vs. *Sreekishen Doss*, 9 W. R., 500. The person liable is the principal, and not the agent. Thus, where a purchaser was allowed to sign the sale sheet as "Mokhtear

purchased for Mussamut Deoranee Kooer," it was held that Mussamut Deoranee Kooer, and not the Mokhtear was responsible; and that if she repudiated the position of principal then, although the Mokhtear might be liable in a civil suit for misrepresentation or breach of contract, he was not subject to the summary process under the Code—*Haree Ram* vs. *Hur Pershad Singh*, 20 W. R., 80; *id.* 397. So where A purchased as "Mother and Guardian of her infant son" the minor was the real purchaser—*Hemanginee Dossee* vs. *Jogendro Narain Roy*, 12 W. R., 236.

A purchased at a sale in execution of a decree obtained by B. Next day the property was sold in execution of a decree obtained by C, who had a lien prior to that of B. A refused to carry out the sale. It was held that he was liable under this section—*Soorj Buksh Singh* vs. *Sree Kishen Doss*, 6 W. R., Mis., 126. But where A purchased, made default, and a re-sale was ordered, and before the sale took place the property was sold by another judgment-creditor at a lower price, it was held that the second sale was not a re-sale within the Act, and the first purchaser was not liable to pay the difference—*Bisoka Moyee Chowdhrani* vs. *Sonaton Doss*, 16 W. R., 14.

Who may proceed against the defaulter.—Either the judgment-creditor or the judgment-debtor may proceed against the defaulter, but the judgment-creditor is not bound to do so, and may elect to proceed against any other property of his debtor, leaving him his remedy—*Khiroda Moyee Dassee* vs. *Golam Somdanee*, 21 W. R., 149; *Gour Chunder Biswas* vs. *Chunder Coomar Roy*, 10 C. L. R., 236; I. L. R., 8 Cal., 291; nor in such a case can the amount bid at the first sale be deducted from the debt—*Anandrav Bapuji* vs. *Sheikh Baba*, I. L. R., 2 Bom., 562; *Gour Chunder Biswas* vs. *Chunder Coomar Roy*, I. L. R., 8 Cal., 291; unless the creditor is the defaulting purchaser—*Joobraj Singh* vs. *Gour Buksh Lal*, 7 W. R., 110. The re-sale should only cover the same property—*Joy Chunder Biswas* vs. *Kali Kishur Dey Sircar*, 8 C. L. R., 41.

Formerly an appeal lay from an order under this section—*Joobraj Singh* vs. *Gour Buksh Lal*, 7 W. R., 110; as to the existing law see section 588, *post*.

Decree-holder not to bid for or buy property without permission.

294. No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

If decree-holder purchase amount of decree may be taken as payment.

When a decree-holder purchases with such permission, the purchase money and the amount due on the decree may, if he so desires, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale, and all expenses attending it, shall be paid by the decree-holder.

This section is new. It applies to H. C. and M. S. C. C.

The purchaser under this section must make the deposit in cash required by section 306, but the sale should not be set aside for default, where all the parties interested waive their right to have the deposit made—*Gopal Singh* vs. *Roy Bunwaree Lall Sahoo*, 5 C. L. R., 181.

In the Mofussil, the decree-holder when purchaser gives a receipt for the purchase-money, and petitions that satisfaction may be entered up for the amount. See *Khellat Chunder Ghose* vs. *Keshub Chunder Paul Chowdhry*, 16 W. R., 46. In regard to the sale he is bound to exercise the utmost fairness and if he or his agent disuade others from buying—*Woopendro Nath Sircar* vs. *Brojendronath Mundul*, I. L. R., 7 Cal., 346, or openly depreciate the property—*Rukhinie Bullubh* vs. *Brojonath Sircar*, I. L. R., 5 Cal., 308, the sale will probably be set aside.

A purchase by the decree-holder without permission is not *ipso facto* void ; but is valid until set aside under this section—*Sabherbhai* vs. *Haribhai*, I. L. R., 5 Bom., 575.

A purchase by the son of a decree-holder, who is joint with his father, with moneys not proved to be separate, is a purchase by the decree-holder himself—*Narain Deshpande* vs. *Anaji Deshpande*, I. L. R., 5 Bom., 130.

The judgment-debtor cannot bring a regular suit to set aside a sale at which the decree-holder purchased, he is debarred by section 244, *ante*—*Virara Shava* vs. *Venkata Charyar*, I. L. R., 5 Mad., 217.

Amount due on the decree.—Rather, that portion of the assets which is coming to this decree-holder ; for where more than one decree-holder has applied for execution this section must be taken subject to the provisions of section 295—*Shrinivas* vs. *Radhabhai*, I. L. R., 6 Bom., 570 ; *Viraragava Varada*, I. L. R., 5 Mad., 123.

Proceeds of execution-sale to be divided rateably among decree-holders.

295. Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons :

Provided as follows :—

Proviso where property is sold subject to mortgage.

(*a*) when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale :

(*b*) when any property is liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold.

Proviso.

(*c*) when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the interest and principal-money due on the incumbrance ;

thirdly, in discharging the interest and principal-moneys due on subsequent incumbrances (if any) ; and

fourthly, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees and have not obtained satisfaction thereof.

If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

Nothing in this section affects any right of the Government.

This section applies to H. C. and M. S. C. C.

This section is but a rule of procedure, and does not affect the civil rights of the parties—*Raj Chunder Shaha* vs. *Hur Mohun Roy*, 22 W. R., 98; and a regular suit will lie to determine their equitable rights—*Gogaram* vs. *Kartick Chunder Singh*, 9 W. R., 514; *Gokool Dass* vs. *Gungesher Singh*, 3 Alla., 164; *Hasoon Arra Begum* vs. *Jawadoonnissa*, I. L. R., 4 Cal., 29; see however *Gopee Nath Acharjee* vs. *Achcha Bibee*, I. L. R., 7 Cal., 553; but plaintiff must make all the persons who have shared in the distribution defendants—*Brojokant Chuckerbutty* vs. *Banee Madhub Dischit*, 23 W. R., 434; on the other hand, failure to participate does not prevent a creditor executing his decree in any other manner—*Syud Nadir Hossein* vs. *Babboo Pearee Thovildarinee*, 19 W. R., 255.

This section only applies where the decree-holders have all applied to the same Court for execution of their decrees—*Gopee Nath Acharjee* vs. *Achcha Bibee*, 9 C. L. R., 395; though they may not have all attached—*Mohunt Megh Lal* vs. *Shib Pershad Madi*, I. L. R., 7 Cal., 34; and where assets have been realized—*Balaji Ram Chundra* vs. *Gojanan Babaji*, 11 Bom., 161; *Beshen Chunder Shurma Chowdry* vs. *Mun Mohinee Dabee*, 8 W. R., 501, under a judicial order—*Anund Lall Doss* vs *Jullodhur Shaw*, 17 W. R., 313; either by sale or otherwise in execution,—a payment by a debtor under arrest in satisfaction of the decree is not sufficient—*Purshoram Dass* vs. *Mahant Suraj Vharths*, I. L. R., 6 Bom., 588—and are actually in Court—*Anundolall Doss* vs. *Jullodhur Shaw*, 11 W. R., 9; although the sale may not have been made absolute—*Vishvanath Maheshur* vs. *Virchand*, I. L. R., 6. Bom., 16; and prior to the realisation there were persons taking out execution in the same Court—*Krishna Shankar* vs. *Chandra Shankar*, I. L. R., 5 Bom., 198, claiming not under the same but different money-decrees—*Mirza Abid Ali* vs. *Munnoo Byas*, 2 Agra, 183, (which includes a money-decree on a mortgage bond when no lien is declared—*Gur Sahai* vs. *Ram Dial*, 7 Alla., 91) who made a *bonâ fide* application for satisfaction—*Shib Narain Paul* vs. *Koonjoo Kaminee Dabee*, 22 W. R., 466; and it is not shown that the decrees are barred—*Radha Gobind Sha* vs. *Shaikh Oozeer*, 15 W. R., 219, or that they are not pending in execution—*Mussamut Binda Bibee* vs. *Lalla Gopeenath*, 21 W. R., 66. All will share equally in the surplus after deducting the costs of realization; there is no priority except perhaps in the case of crown debts—*In re Henley & Co.*, 9 Ch. Div., 469; *Secretary of State for India* vs. *The Bombay Landing Co.*, 5 Bom., 53; or of rent realized by the sale of the house or building for which it was due—*Maniklal Veuelal* vs. *Lakha*, I. L. R., 4 Bom., 429.

Certain moveable property was attached in execution of decrees of the Small Cause Court at Ahmedabad. After the attachment, but before the sale of the attached property, other creditors of the same judgment-debtor obtained decrees against him in the Court of the Subordinate Judge at the same place and applied to it for the attachment of the same property in execution of their decrees. The Subordinate Judge, accordingly attached it by prohibitory orders issued to the Judge of the Small Cause Court. After the sale, the holders of the decrees obtained in the Judges Courts, claimed a rateable share in the assets realized by the Small Cause Court under section 295 of Act X of 1877. *Held*, that they were not entitled to any share in the assets realized by the Small Cause Court until after satisfaction of the decrees of the Small Cause Court—*Jetha Madhavji* vs. *Najeralli Abhramji*, I. L. R., 4 Bom., 472; followed in *Krishna Shankar* vs. *Chandra Shankar*, I. L. R., 5 Bom., 198.

The holder of a decree for unascertained mesne profits who has applied for execution is entitled to share—*Viraragava* vs. *Varada*, I. L. R., 5 Mad. 123.

Sold subject to mortgage.—This section refers to cases in which the property is sold with notice of the mortgage, and not to cases where property subject to an undisclosed mortgage is sold in execution—*Joychunder Ghose* vs. *Ram Narain Poddar*, 21 W. R., 43; *Fukeer Buksh* vs. *Chutturdharee Chowdhry*, 14 W. R., 209.

When property is sold subject to a mortgage, the mortgagee is not entitled to participate, but if the decree-holder, knowing of a mortgage, suppresses all mention of it in the notification, and causes the property, to be sold as unencumbered and receives the full value

of it as if it were free from mortgage, the mortgagee would probably have a good action against him for repayment—*Douglas* vs. *Collector of Benares*, 5 Moore, 296; and where in execution of a decree, the rights, title and interests of the judgment-debtor in certain property were sold by the decree-holder but without notice of a mortgage held on it, it was held that the absolute right passed as against the decree-holder to the purchaser, that neither he nor his assignee of the decree on the mortgage bond could realise the latter debt by sale of the same property, because the vendor had suppressed the fact of the charge and thereby induced the first purchaser to buy—*Doollub Sircar* vs. *Kristo Coomar Bukshee*, 12 W. R., 303; 3 B. L. R., 407.

An estate was mortgaged in 1863, and again in 1867 to the same person in substitution of the mortgage of 1863 and in continuation of the security given by it; the securities obtained in 1863 were given up. In 1864 the property was mortgaged to a different person. It was held that the first mortgagee was entitled to priority for the amount outstanding from the first mortgage of 1863 and revived in the mortgage of 1867, then the second mortgagee for the amount of his mortgage, and the residue to the first mortgagee—*Mussamut Woseeun* vs. *Baboo Byjnath Singh*, 25 W. R., 171; where a creditor got a decree declaring the debt leviable on certain property mortgaged for the debt as well as other landed property that might be found in the possession of the debtor, and the mortgaged property was sold under another decree subject to his lien, it was held that he could not get any part of the sale proceeds unless it were shewn that the mortgaged land had not produced enough to satisfy his claim—*Kalee Dass Ghose* vs. *Lall Mohun Ghose*, 16 W. R., 306; but where A and B were sued on bill of exchange by B, and A mortgaged certain property of B as security for the payment, which was afterwards sold subject to B's mortgage in execution of a decree held by a third party. B got one decree on his bill of exchange and another declaring that he had a good mortgage of A's interest in the property and for an account and sale in default of payment. Subsequently B got an order in his bill of exchange suit, for payment from the surplus sale proceeds in the third party's suit. On appeal from an order ordering B to repay the amount on the ground that he was not entitled to share in the surplus, the order was allowed to stand on B undertaking to pay in to Court the mortgage money with interest, if that sum should be received by him in the mortgage suit—*Bank of Bengal* vs. *Nundolall Doss*, 12 B. L. R., 509. Where seven different properties belonging to the same proprietor had been mortgaged to three different persons, and all of them sued upon their bonds and obtained decrees followed by simultaneous sales in execution, the mortgagees were satisfied out of the entire sale proceeds in the order in which their liens had been created—*Gopee Singh* vs. *Baboo Kisha Lall*, 25 W. R., 187.

A District Judge cannot pass any order under this section in connection with property sold pursuant to a decree of a Subordinate Judge—*Nobo Kishore Dass* vs. *Protab Chunder Banerjee*, 1 Shome, 104.

A manager may be appointed under this section without the consent of the decree-holder, with directions to pay the judgment-creditors rateably; but he cannot be directed to satisfy the claims of persons other than decree-holders—*Thakoor Chunder*, Petitioner, Marsh., 261.

The Nazir of the District Judge held and conducted a sale in execution of a decree passed by a Subordinate Judge. Held, that in reference to the sale, the District Judge had no jurisdiction to pass any orders under section 270, Act VIII of 1859, or any order respecting the re-sale of the property—*Nobo Kishore Dass* vs. *Protap Chunder Banerjea*, 1 Cal. L. R., 534.

Surplus Sale Proceeds.—When surplus sale proceeds are deposited in Court the Judge should not pay out the money, but to the party in whose name it stands or his agent—In the matter of *Puddabutty Dossia*, 12 W. R., 352.

A and B held a decree against C, and D held another decree against C and E jointly and severally. C and E each possessed immoveable property separately as well as other immoveable property. C's immoveable property was put up to sale in execution of the first decree and realised sufficient to satisfy both decrees. Held the same property could not be sold a second time, but action should be taken under this section—*Rati Ram* vs. *Chiranj Lal*, I. L. R., 3 Alla., 579.

(*b*). *Rules as to Moveable Property.*

Rules as to negotiable instruments and shares in public Companies.

296. If the property to be sold be a negotiable instrument or a share in any public Company or Corporation, the Court may, instead of directing the sale to be made by public

auction, authorize the sale of such instrument or share through a broker at the market-rate of the day.

This section applies to H. C. and M. S. C. C.

The Court is not bound to authorise the sale by a broker; it can exercise a discretion to do so or not. Where promissory notes were sold by auction, and the sale proclamation did not, as it ought, give the numbers and amounts of the different notes, and the notes were not brought into Court before sale, but were left in the possession of the Collector, the sale, though considered irregular, was not set aside, as no injury was shewn to have ensued from the irregularities—*Baboo Luchmeeput* vs. *Baboo Lekraj Roy*, 8 W. R., 415.

Payment for other moveable property sold.

297. In the case of other moveable property, the price of each lot shall be paid for at the time of sale, or as soon after as the officer holding the sale directs, and, in default of payment, the property shall forthwith be again put up and sold.

On payment of the purchase-money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute.

This section applies to H. C. and M. S. C. C.

Moveable property.—Huts are not moveable property—*Raj Chunder Bose* vs. *Dharma Chandra Bose*, 2 B. L. R., 77; 10 W. R., 416; and since a Small Cause Court has no jurisdiction to deal with immoveable property, a purchaser of huts in execution of such a decree acquires no title by the purchase—*Nattoo Meah* vs. *Nund Ranee*, 17 W. R., 309. A stone sugar mill is moveable property—*Hurmungal Singh* vs. *Athul Singh*, 4 Alla., 15; see *Miller* vs. *Brindabun*, I. L. R., 4 Cal., 946.

On payment of the purchase-money the sale of moveables becomes absolute, and no irregularity will vitiate it, though a suit will lie to set it aside—*Framji Bersanji* vs. *Hormasji*, I. L. R., 2 Bom., 258, 266. If the moveable property of A is sold in execution of a decree against B, A can follow the property in the hands of the purchaser, or sue him for damages equal in amount to the value of the property; for the latter only purchased the right, title and interest of B—*Mahanund Haldar* vs. *Akial Mehaldar*, 9 W. R., 118.

The officer conducting the sale can allow the purchaser a reasonable time to pay the purchase-money—*Shah Fareed Alum* vs. *Sheo Charun Ram*, 4 Alla., 37.

The provisions of section 293, *ante*, making a defaulting purchaser liable for any deficiency, apply to re-sales under this section—*Ramdhoni Sahai* vs. *Rajrani Koer*, I. L. R., 7 Cal., 337.

Irregularity not to vitiate sale of moveable property, but any person injured may sue.

298. No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person be the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

This section applies to H. C. and M. S. C. C.

Irregularity.—No irregularity in the sale of moveable property will vitiate the sale, but the person injured may sue to set aside the sale—*Framji Besanji Dustur* vs. *Hormasji Pestanji*, I. L. R., 2 Bom., 258, 266, or for compensation, in all cases; and where the person causing the injury is also purchaser, the suit may be for the specific property, or compensation in default of recovery. The introduction into the Code of the substantive law contained in the latter portion of the section is stated to have been made on account of the case of *Mahanund Haldar* vs. *Akial Mehaldar*, 9 W. R., 118, which decided that if the property of A be sold in execution of a decree

against B, the sale is not an irregularity within this section, and A can follow the purchaser for the property or its value as damages, or in other words, the right, title and interest of the judgment-debtor in the property may be challenged and contested within the period of limitation without suing to set aside the sale—*Mussamut Sharafatunissa* vs. *Lachmi Narain*, 7 Alla., 288. See *Mussamut Hirdy Bibee* vs. *Baboo Bishesher Pershad*, S. D., N. W., 1867, p. 175. Nor is his remedy confined to suing the purchaser; he may obtain damages from the judgment-creditor—*Kanaye Pershad Bose* vs. *Hur Chund Manoo*, 14 W. R., 120.

Irregularity.—Omission to state the value of the property sold, in the sale proclamation—*Kassee Nauth Chowdhry* vs. *Hullodhur Roy*, 2 W. R., 60; or to serve the notification of sale on the judgment-debtor in person, or in the village in which he lives—*Romesh Chunder Banerjee* vs. *Jadub Chunder Chatterjee*, 6 W. R., 14; or overstating the balance due, is not an irregularity within this section—*Chatter Singh* vs. *Mussamut Dhurum Koonwur*, 1 Alla., 61.

Delivery of moveable property actually seized.

299. When the property sold is a negotiable instrument or other moveable property, of which actual seizure has been made, the property shall be delivered to the purchaser.

This section applies to H. C. and M. S. C. C.

Delivery of moveable property to which judgment-debtor entitled subject to lien.

300. When the property sold is any moveable property to which the judgment-debtor is entitled subject to the possession of some other person, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

This section applies to H. C. and M. S. C. C.

Delivery of debts and of shares in public Companies

301. When the property sold is a debt not secured by a negotiable instrument, or is a share in any public Company, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the Manager, Secretary or other proper officer of the Company from permitting any such transfer or making any such payment to any person except the purchaser.

This section applies to H. C. and M. S. C. C.

Transfer of negotiable instruments and shares.

302. If the endorsement or conveyance of the party in whose name a negotiable instrument or a share in any public Company is standing, is required to transfer such instrument or share, the

Judge may endorse the instrument or the certificate of the share, or may execute such other document as may be necessary.

The endorsement or execution shall be in the following form or to the like effect :—" *A. B.*, by *C. D.*, Judge of the Court of *(or as the case may be)* ; in a suit by *E. F.* against *A. B.*"

Until the transfer of such instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon, and to sign a receipt for the same ; and any endorsement made, or document executed, or receipt signed, as aforesaid, shall be as valid and effectual for all purposes as if the same had been made or executed or signed by the party himself.

Act VIII, 1859, section 267. This section applies to H. C. and M. S. C. C.
See note under section 262, *ante*.

Vesting order in case of other property.

303. In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

This section applies to H. C. and M. S. C. C.

(c).—*Rules as to Immoveable Property.*

What Courts may order sales of land.

304. Sales of immoveable property in execution of a decree may be ordered by any Court other than a Court of Small Causes.

This section applies to H. C.

The provisions of the Code for the sale of immoveable property govern the sale of a decree declaring a charge upon land—*Mussamut Bhuwani Kuar* vs. *Gulab Rai*, I. L. R., 1 Alla., 348.

The purchaser at a sale of immoveable property under a Small Cause Court decree acquires no title in the property—*Natto Meah* vs. *Nund Ranee*, 17 W. R., 309 ; nor can an ordinary Civil Court sell immoveable property outside its jurisdiction—*Syud Nowab Ali* vs. *Sheikh Uzir Mohamed*, 23 W. R., 233 ; it should follow the procedure laid down in section 223, *ante*.

A Small Cause Court is competent to sell the undivided right, title and interest of a deceased debtor to which the defendants succeeded, in moveable property, in satisfaction of a decree obtained against the defendants, without infringing section 6 of Act II of 1865—*P. Ahobalasoo Chetty* vs. *Venkatakristnamma*, 5 Mad., 275 ; but not a mortgage bond of immoveable property—*Buddoo Mull* vs. *Maharoop*, 6 Alla., 129.

Where a decree declares a lien on specific property it may be executed in the usual way, although there is no declaration in it that the decree-holder can sell—*Nuddyabashee Doss* vs. *Reza Chowdry*, 15 W. R., 337.

Postponement of sale of land to enable defendant to raise amount of decree.

305. When an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by mortgage or lease or private sale of

such property, or some part thereof, or of any other immoveable property of the judgment debtor, the Court may on his application postpone the sale of property comprised in the order for sale, for such period as it thinks proper to enable him to raise the amount.

Certificate to judgment-debtor.

In such case the Court shall grant a certificate to the judgment-debtor authorizing him, within a period to be mentioned therein, and notwithstanding anything contained in section 276, to make the proposed mortgage, lease or sale: provided that all moneys payable under such mortgage, lease or sale, shall be paid into Court and not to the judgment-debtor:

Provided also that no mortgage, lease or sale under this section shall become absolute until it has been confirmed by the Court.

This section applies to H. C.

Postponement.—In acting under this section the Courts should exercise a reasonable discretion and should not postpone the sale unless the judgment-debtor can make out a fair case—*Kishen Comaree Bibee* vs. *Golab Cumaree Bibee*, 15 W. R., 477, and shew that the creditor will not suffer—*Ram Ruttun Neogy* vs. *Land Mortgage Bank*, 17 W. R., 193; and then the postponment should be only for a reasonable period—*Rednum Achutaramayya* vs. *Khaja Mahomed Amin Akan*, 5 Mad., 272; *Suhuj Narain Sahee* vs. *Ram Pershad Misser*, 21 W. R., 146; such as three or six months—*Roop Kissore* vs. *Mahomed Abdool Ali Khan*, S. D., N. W., 1869, p. 42; *Mohinee Mohun Doss* vs. *Ram Kant Chowdhry*, 15 W. R., 322; a year is unreasonable—*Fyzooddeen* vs. *Giraudh Singh*, 2 Alla., 1. The Court cannot lease or mortgage the property itself—*Luchmeeput Doogar* vs. *Maharaja Juggut Indur Tewaree*, W. R., 1864, Mis., 5; and once property has been put up for sale and bids have been made *bonâ fide*, it has no power to postpone the sale or decline to conclude it and order another auction on the mere representation of the debtor that he can obtain a higher price by private sale; at any rate not without proof that the amount of the debt could be so raised —*Baboo Luchmee Narain* vs. *Baboo Bhyroo Pershad*, 2 Agra, Mis., 11.

This section does not apply to a decree founded on a mortgage when that decree declares that certain property is to be sold in satisfaction of the mortgage debt—*Oomda Kahnum* vs. *Maharanee Raj Roop Kooer*, 1 C. L. R., 295.

An appeal lay from an order under Act VIII of 1859, section 243—*Hanooman Pershad* vs. *Ajoodhia Pershad*, 10 W. R., 5; 1 B. L. R., 7. See now, section 588, *post*.

Deposit by purchaser of immoveable property.

306. On every sale of immoveable property under this chapter, the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per centum on the amount of his purchase-money to the officer conducting the sale, and, in default of such deposit, the property shall forthwith be put up again and sold.

This section applies to H. C.

An officer conducting a second sale under this section is not bound to commence from the next highest bid below that made by the defaulter; he may do so if the next highest bidder is willing to abide by his bid, otherwise he should commence the sale *de novo*—*Gour Mookh Singh* vs. *Lalla Gour Sunkar*, 1 W. R., Mis., 11. It has been decided that the second sale need not be held on the same day as the first, and that in re-sales under this section, the first purchaser can be compelled to pay the difference between the first and second sales—*Ajoodhya Persad* vs. *Gopal Dutt Misser*, 17 W. R., 271. The first part of this decision is certainly opposed to the words "forthwith be put up again and sold," and to the case of *Chulkoo Dutt Jha* vs. *Rajah Leelanund Singh*, W. R., 1864, Mis., 30; the second part is opposed to the case of *Sree Narain Mitter* vs. *Maharajah Mahtab Chund Bahadoor*, 3 W. R., 3, and is not now law. See section 293, *ante*.

The officer conducting the sale cannot insist upon a deposit being made before acceptance of a bidding; but if it appear that persons without means have been put forward to make sham biddings and fraudulently frustrate the sale, he would be justified in enquiring into the trustworthiness of the bidder before accepting his bid—*Rajah Mohesh Narain Sing* vs. *Kishanund Misr*, 9 Moore, 324; and the sham bidder would be liable under section 228 of the Penal Code for obstructing the sale—*Mohesh Chunder Mookerjee*, Appellant, W. R., 1864, Mis., 3.

The decree-holder to whom a lot is knocked down is bound to make the usual deposit—*Chulkoo Dutt Jha* vs. *Rajah Leelanund Singh*, W. R. 1864, Mis., 30; unless all the parties, interested in the amount to be deposited wave their right to a cash deposit—*Gopal Singh* vs. *Roy Bunwaree Lall Sahoo*, 5 C. L. R., 181.

Time for payment in full.

307. The full amount of purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office-day after the fifteenth day.

This section applies to H. C.

In computing the fifteen days the day of sale should be excluded—*Amanee Begum* vs. *Koorban Ali*, 3 Agra, 240.

Section 293, *ante*, applies to defaulting purchasers—*Javher Bhai* vs. *Hari Bhai*, I. L. R., 5 Bom., 575; *Ram Dhani* vs. *Rajrani Koer*, I. L. R., 7 Cal., 337.

Procedure in default of payment.

308. In default of payment within the period mentioned in the last preceding section, the deposit, after defraying the expenses of the sale, shall be forfeited to Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

This section applies to H. C.

Under Act VIII of 1859 section 254, the defaulting purchaser and decree-holder were considered in Bengal as parties to the suit, and an appeal lay from a decision under section 254—*Bisokha Moyee Chowdhrain* vs. *Sonatum Doss*, 16 W. R., 14; *Ram Dial* vs. *Ram Dass*, I. L. R., 1 Alla., 181. See note under section 293, *ante*.

Notification on re-sale of immoveable property.

309. Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh notification in the manner and for the period hereinbefore prescribed for the sale.

This section applies to H. C.

This section does not relate to cases in which the sale has been postponed for the convenience of the debtor; but to re-sales only—*Budree Nauth Bhutt*, Petitioner, 1 W. R., Mis., 3.

Co-sharer of share of undivided estate sold in execution to have preference in bidding.

310. When the property sold in execution of a decree is a share of undivided immoveable property, and two or more persons of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer.

This section applies to H. C.

Advance the sum.—This section contemplates a distinct bid by the co-sharer in the ordinary way. It is not sufficient that he prefers his right of pre-emption and offers to pay a sum equal to that bid by the highest bidder—*Hira* vs. *Unas Ali Khan*, I. L. R., 3 Alla., 827; *Tej Singh* vs. *Gobind Singh*, I. L. R., 2 Alla., 850.

This section is a great improvement on the old law. It gives a person who is a co-sharer at the time of sale—*Dwarka Prashad Sukul* vs. *Ram Autar Sukul*, 7 Alla., 281, and having a right of pre-emption in any undivided immoveable property (see *Ram Auter* vs. *Sheo Dutt*, 6 Alla., 243) held jointly by him and the judgment-debtor, not merely a right which must be enforced in a regular suit, but to have the sale perfected with him in execution—*Tasuduk Ali* vs. *Muksud Ali*, 6 Alla., 272. See, however, *Syud Abdool Jaleel* vs. *Kalee Koomar Dutt*, 6 W. R., Mis., 3. Except as laid down in the section there is no pre-emption in property sold in execution of decree—*Abdool Jaleel* vs. *Khellat Chunder Ghosh*, 10 W. R., 165; *Sheikh Nuzmoodeen* vs. *Kunye Jha*, Marsh., 555; and it does not apply when the property sold is not a share of undivided immoveable property but only the interest of a mortgagee in such a share—*Sairam Dass* vs. *Beni Prosad*, I. L. R., 3 Alla., 15. In Act XXIII of 1861 the word co-sharer was qualified by the words "other than the judgment-debtor," so that the judgment-debtor may now purchase.

The buyer should take care to buy in the name of a co-sharer. In a case in which a co-sharer, brought not in his own name but in the name of B, not a co-sharer, it was held no pre-emption accrued—*Gunga Ram* vs. *Moola*, 2 Alla., 200.

Appeal—A co-sharer not a party to the suit cannot appeal from an order confirming the sale in favour of another bidder—*Munir Udden Khan* vs. *Abdul Rahim*, I. L. R., 3 Alla., 674.

Application to set aside sale of land on ground of irregularity.

311. The decree-holder, or any person whose immoveable property has been sold under this chapter, may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it;

but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

This section applies to H. C.

This section applies to sales of undertenures made under the rent Act—*Azizoonnissa Khatoon* vs. *Gora Chand Doss*, I. L. R., 7 Cal., 163; 8. C. L. R., 498.

The applicant must be either the decree-holder or the person whose immoveable property has been sold, whether he is judgment-debtor or not, though probably the old law that where the creditor purchased the debtor could object to the sale after his right, title and interest had been sold under a previous execution on the ground that the judgment-creditor having purchased he would be estopped from denying the debtor has any interest in the property sold—*Baboo Reet Bhunjun Singh* vs. *Baboo Meeturjeet Singh*, 6 W. R., Mis., 31. This section settles a disputed point. Under Act VIII, the Bombay Courts held any person who had sustained substantial injury by reason of the irregularities, could apply under this section—*Krishnarv Venkatesh* vs. *Vasudev Anant*, 11 Bom., 15. The Calcutta and North-West Courts confined the term applicant to the judgment-debtor, and refused to hear third parties—*Joge Narain Singh* vs. *Bhugbano*, 2 W. R., Mis., 13; *Luchmeeput Singh Doogur* vs. *Mooktakashee Debia*, 9 W. R., 388; *Rai Sita Ram* vs. *Lalkrishna Jewaree*, 1 S. D., N W., 377. The Code seems to follow neither decision.

Irregularity.—This section is confined to cases in which some irregularity has been committed, and does not apply when the sale is sought to be set aside on some other ground than mere irregularity, such as fraud—*Umbika Churn Chuckerbutty* vs. *Dwarkanath Ghose*, 8 W. R., 506; or that the purchaser had fraudulently induced the decree-holder to make false returns—*Nund Lal Doss* vs. *Delawar Ali*, 11 W. R., 244; or that the Nazir in collusion with the purchasers fraudulently sold the property for a small sum—*Virsingappa* vs. *Sadashivappa*, 7 Bom., 74; or that the decree was without jurisdiction—*Lall Soondar Lall* vs. *Hubeeboonnissa*, 15 W. R., 311; or had been satisfied—*Abdool Hye* vs. *Nawab Raj*, 9 W. R., 196; or that the party whose property was sold, was not the judgment-debtor, or if the property of his representative that the latter had inherited nothing from him—*Chowdhry Shaikh Wahed Ali* vs. *Mussamut Jumaya*, 6 W. R., Mis., 116. Such objections do not fall within this section. The irregularity must have been committed in publishing or conducting the sale, which refers only to acts done down to the conclusion of the sale when the lot is knocked down to the highest holder. One debtor satisfied the judgment, and taking an assignment of the decree was allowed wrongfully to sue out

execution, and sold the property of his co-debtor. It was held that the person obtaining the execution should not be allowed to retain possession of the sale proceeds; but, as the irregularity had arisen in granting execution and not in publishing or conducting the sale, that the sale could not be set aside summarily—In the matter of the petition of *Digumburee Dabee*, B. L. R., (F. B.) 945.

And so where a Judge received payment after the fifteenth day from the date of sale, the irregularity was held not to fall within this section—*Brinda Debee Dassee* vs. *Gopee Soonduree Dassia*, 6 W. R., Mis., 82. In the North-West, if a sale takes place under an order or decree after the order or decree has been reversed, but before the order of reversal can reach the selling officer, an irregularity has ensued—*Nonidh Singh* vs. *Mussamut Sohun Kooer*, 4 Alla., 135; and the sale should be set aside—*Maijha Singh* vs. *Jhow Lal*, 6 Alla., 354.

Material irregularity.—The irregularity must also be material. Issuing a notice of sale after the death of the original decree-holder and before any person had applied to be substituted for him—*Govind Chunder Aooch* vs. *Bamun Doss Mookerjee*, 22 W. R., 481; issuing notices of attachment and sale together—*Huro Soonduree Debia* vs. *Brojo Gobind Shaha*, 4 W. R., Mis., 12; overstating the balance due at the time of sale—*Chuttur Singh* vs. *Mussamut Dhurrum Koonwur*, 1 Alla., 61; or entering the wrong pergunnah in the proclamation, if it be served in the right village—*Nooral Hossein* vs. *Ram Coomar Sahee*, 25 W. R., 326; or publishing the notification of sale at an inferior cutcherry, the chief cutcherry being beyond jurisdiction—*Hubeebool Hossein* vs. *Allender*, 14 W. R., 44; selling on a close holiday—*Bisram Mahton* vs. *Sahibunnissa*, I. L. R., 3 Alla., 333; or selling a portion of an estate as within jurisdiction although the greater part fall in another district *Shib Narain Singh* vs. *Gobind Doss Bhukut*, 23 W. R., 154; or though there may have been property to satisfy the decree in the district in which it was passed—*Kallee Prosonno Bose* vs. *Dinonath Bose Mullick*, 19 W. R., 434; or publicly postponing a case to the following day because there was no person present who would give nearly the value of the property—*Nuddea Kishore Doss* vs. *Bungshee Mohun Doss*, 17 W. R., 210, or by an order in open Court—*Roy Gourie Nath Sahoy* vs. *Shah Fakeer Chand*, 18 W. R., 347, but see *Hurbuns Sahai* vs. *Bhairo Pershad*, 4 C. L. R., 23; or notifying that the sale of land in A would begin in A or B and be completed at B—*Gobind Hari Valekar* vs. *Bank of India*, 4 Bom., 164; or selling property in lots though attached and proclaimed in its entirety—*Abdool Hye* vs. *Macrae*, 23 W. R., 1; is not a material irregularity, though the sale of one-half after the whole had been proclaimed has been set aside as *ultra vires*—*Panch Lall* vs. *Sri Ram Banerjee*, 1 Shome, 10. But a serious misstatement of the Government revenue in the notification—*Girdhari Singh* vs. *Hurdeo Narain Singh*, 8 Ind. App., 230; *Mohabir Pershad Singh* vs. *Olpherts*, 9 C. L. R., 134; though omitting to state the rent apparently is not—*Mohendro Coomar Dutt* vs. *Heera Mohun Coondoo*, I. L. R., 7 Cal., 723; or making a partition in execution instead of selling the *undivided share*—*Mathuradas Govurdhandas* vs. *Fatima Ulka Begam*, 5 Bom., 63: or selling on a holiday or other day closed by order of the High Court—*Haro Jemadar* vs. *Jadub Chunder Holdar*, 3 W. R., Mis., 24; or selling without a new proclamation after several adjournments, by consent of parties and there has been no waiver—*Hurbuns Sahoy* vs. *Bhairo Pershad*, 4 C. L. R., 23, either where there has been any postponement—*Gopee Nath Dobey* vs. *Roy Luchmeeput*, I. L. R., 3 Cal., 542; or after a portion of the property has been re-leased to a third party—*Shib Prokash Singh* vs. *Sardar Doyal*, I. L. R., 3 Cal., 545; or issuing a sale notification under Circular Order of the 18th of August, 1873, without notifying in it that the property will be sold on a day named, or as soon thereafter as it may come up in the list—*Bykant Nath Sandyal* vs. *Juggut Mohun Saha*, 24 W. R., 240, or attaching and advertising property of A and B for sale under a mortgage decree and subsequently previous to sale announcing only the right, title and interest of A will be sold—*Mohun Das Chowdhry* vs. *Bhoobunjoy*, 6 C. L. R., 237, is material. Any irregularity brought about by the contrivance of the decree-holder will be closely looked at—*Tekaet Bhao Narain Deo* vs. *The Court of Wards*, 15 W. R., 58, and where a sale was held without issuing notice under section 248, *ante*—*Ramhurry Dasi* vs. *Durga Das Chatterjee*, 7 C. L. R., 85; I. L. R., 6 Cal., 103, or after discouraging other bidders—*Woopendro Nath Sircar* vs. *Brojendro Nath Mundul*, 9 C. L. R., 263, the sale will if possible be set aside.

Substantial injury.—The applicant must shew that he has sustained substantial injury by *reason* of the irregularity, and if he cannot connect the irregularity with the injury he must fail—*Alimooddy Chowdhry* vs. *Chunder Nath Sen*, 24 W. R., 227; *Chunder Sikhur Deb* vs. *Jadub Chunder Sett*, 19 W. R., 78; it is sufficient to shew that the irregularity would naturally cause the injury complained of—*Sheo Prokash Misser* vs. *Hurdai Narain*, 22 W. R., 550. And if substantial injury has been sustained the presumption is that the injury was due to the irregularity—*Bonmali Mozumdar* vs. *Woomesh Chunder Banerjee*, 9 C. L. R., 341; I. L. R., 7 Cal., 730; *Kalytara Chowdhrain* vs. *Ram Coomar* I. L. R., 7 Cal., 466. See however *Olpherts* vs. *Mohabir Pershad*, *(P.C.)*, *Nov. 24th* 1882. The sale will then be set aside, unless the applicant has by his conduct equitably estopped himself for pleading the irregularity; and a mere petition for postponement is not sufficient to bar him—*Thakoor Mahtab Deo* vs. *Leelanund Singh*, 9 C. L. R., 399; I. L. R., 7 Cal., 613. If a judgment-debtor petitions that a sale should be postponed for one month, the proclamation and attachment to remain, and the sale takes place at the end of the month, the debtor cannot plead that a notification should have issued—*Hills* vs. *Osman Biswas*, 25 W.

R., 35; *Baboo Hurdeo Narain Sahoo* vs. *Gridharee Singh*, 19 W. R., 227; and where the sale notification wrongly stated the Government revenue to be Rs. 3,146 instead of Rs 8,146, and the sale was postponed on an application by the debtor asking, among other things, that the attachment and the notification of the sale should be maintained, it was held that the error was material, but that the debtor had estopped himself from saying there was any error in the notification after he had agreed to the postponement with the notification being maintained—*Gridhari Singh* vs. *Hurdeo Narain Singh*, 3 Ind. App., 240.

Sale set aside.—When the sale was on the day previous to that fixed in the order of postponement—*Jhoomuck Chowdhry* vs. *Raja Radha Persad Sing*, 25 W. R., 328, or after it—*Shoshee Mookhee Burmonya* vs. *Dwarkanath Biswas*, 6 W. R., Mis., 84, (especially if the creditor is the purchaser—*Kishen Prosunno Mojoomdar* vs. *Nurduma Dossee*, 17 W. R., 339); or at an hour not mentioned in the notification—*Khodeja Bebee* vs. *Moonshee Johad Roheem*, 14 W. R., 320; or after an indefinite postponement without a new proclamation—*Okhoy Chunder Dutt* vs. *Erskine*, 3 W. R., Mis., 11; or if the advertised order in which it should take place was suddenly changed—*Pokraj Singh* vs. *Gossain Munraj Pooree*, 12 W. R., 281; or property, advertised to be sold in lots was sold in a lump—*Sreekunt Doss* vs. *Ramjeebun Roy*, 18 W. R., 342 (see, however, *Urquhart* vs. *Nundeeput Mahaputtur*, 12 W. R., 492; 13 W. R., 209); or Kurkuns read out notices of liens and affirming the existence of a mortgage on the property—*Govind Hari Valekar* vs. *Bank of India*, 4 Bom., 164, and the property has been sold at an inadequate price, the sale will be set aside. And where a District Judge, who had no authority to call up a case from the file of a Subordinate Judge, sold the whole of the property, when part would suffice, against the will of the debtor, the sale was set aside—*Moulvi Abdool Hye* vs. *Macrae*, 23 W. R., 1.

Effect of setting aside a sale.—When a sale is set aside the parties are simply remitted to the position in which they stood immediately before the sale, without prejudice to any other proceedings in execution which have been legally performed. Thus where a sale was set aside on the ground that all the formalities prescribed by law had not been followed, the attachment was held to have revived—*Gunno Singh* vs. *Muddun Mohun Singh*, W. R., Sp., No. 26; so where property had been sold four times and the sales proved unfructuous because the highest bidders turned out to be only nominal purchasers, and the final sale was impeached on the ground that immediately before it a copy of the decree had not in accordance with Reg. XX of 1793, been transmitted to the Board of Revenue the objection was overruled inasmuch as the terms of the Regulation had been complied with before a previous sale—*Rajah Mohesh Narain Sing* vs. *Kishanand Misser*, 9 Moore, 328.

Sales not set aside.—Where the sale notification omitted to mention the numbers and values of promissory notes sold—*Baboo Luchmeeput* vs. *Baboo Lekraj Roy*, 8 W. R., 415; or the property sold had not been attached—*Jowhuroos Zumma Khan* vs. *Banee Madhub Nundun*, 11 W. R., 226 (but see also the case of *Ram Opnoogroho Singh* vs. *Mussamut Montorun*, 6 W. R., 223); or Kurkuns read out notices of liens at the sale—*Gobind Hari Valekar* vs. *Bank of India*, 4 Bom., 164; or a sale fixed for the 25th, was postponed on the 23rd to the 26th—*Asmutoonissa Bebee* vs. *Khudeenoonnissa Bebee*, 17 W. R., 278; or the judgment-creditor had asked the officer to stay the sale—*Kaminee Dassee* vs. *Gourmoney Dassee*, 1 Ind. Jur., N.S., 359, but the price was not shewn to be inadequate, the sale was not set aside. Mere inadequacy of price without any irregularity is not sufficient to set aside a sale—*Reet Bhunjun Singh* vs. *Meeturjeet Singh*, 6 W. R., 31.

And once the proceedings are at an end the sale cannot be summarily set aside on the application of a third party; his only remedy is a regular suit—*Roy Luchmeeput Singh* vs. *Adoyto Churn Mullick*, 24 W. R., 452.

As to the effect of a fraudulent sale on the rights of third parties, see *Nawab Sidhee Nuzur Ally Khan* vs. *Rajah Ojoodhyaram Khan*, 10 Moore, 540.

Procedure.—Section 647 declares that the Code applies to all miscellaneous proceedings, and when a petition is preferred under this section, the Judge should fix a day for hearing and receive all the evidence tendered by all the parties as to whether or not any material irregularity had ensued and affected the applicant injuriously—*Brojo Mohun Thakoor*, Petitioner, 20 W. R., 424; *Sanwal Singh* vs. *Makhun Panday*, 2 Alla., 143; *Rethbunjun Singh* vs. *Mitturjeet Singh*, 4 W. R., Mis., 9; *Khodeja Bibee* vs. *Ram Narain Dass*, 12 W. R., 511, and come to a distinct finding on each point—*Mussamut Parbutty* vs. *Girdharee Lall*, 6 W. R., Mis., 125. If an application is made within time, it must be dealt with, and it cannot be summarily rejected on the ground that it should have been made earlier, or that the statements contained in it were in all probability not true—*Syud Nujmooddeen Ahmed* vs. *Abdool Azeez*, 15 W. R., 95; *Kalee Sahoy* vs. *Makoond Lall*, 24 W. R., 216. A Nazir's report is not evidence—*Sookh Raj Singh* vs. *Mooftee Tuffezool Hossein*, 2 Alla., 142.

Effect of objection being disallowed and

312. If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser.

If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale.

of its being allowed.

No suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made.

This section applies to H. C.

The mere act of confirming a sale is not an application in aid of execution within the meaning to cl. (4) Art. 179 of Act XV of 1877—*Motendro Chunder Ghose* vs. *Mohendro Nath Ghose*, 10 C. L. R., 330.

Objection disallowed.—If the application is disallowed the Court must pass an order confirming the sale, and the purchaser becomes entitled to the property from the date of the sale—*Raja Luchmin Nath* vs. *Maharaja Vizianagram*, 7 Alla., 310; and, if the application is allowed, the sale must be set aside, and an order passed directing by whom the expenses of the sale should be paid—*Mussamut Hurdei Beebee* vs. *Baboo Surjoo Pershad*, 6 Alla., 309. Where the execution has been set aside for irregularity on the part of the Court officers, it has been held that the judgment-debtor should not be saddled with the costs of the sale—*Hulst* vs. *Luchmun Dass*, 2 Agra, Mis., 1. The proceeding under this section is a judicial, proceeding, and, though a certain latitude is allowed to the Judge, and he is not bound down to the exact case made in the application, the decision must be on a case substantially raised in the pleadings—*Sookoomar Singh* vs. *Kashee Singh*, 13 W. R., 250.

Appeal.—An appeal lies to the High Court, under sections 588, cl. 16, and 589, unless in the special case of documents registered and decrees passed under the Registration Act XX of 1866—*Huro Soonduree, Debia* vs. *Punchoo Ram Mundul*, 24 W. R., 225. In a case before the Privy Council, it appeared that the Judges of the High Court in their judgments said :—"We reverse the order of the Subordinate Judge, dated the 9th of November 1872, and confirm the sale," but the order merely directed that the order of the lower Court be reversed and the sale confirmed. Their Lordships interpreted the order as meaning that the sale should be confirmed by the Judge of the lower Court who had, on disallowing objections, neglected to pass an order confirming the sale, and had afterwards refused to do so—*Girdhari Singh* vs. *Hurdeo Narain Singh*, L. R., 3 Ind. App., 230. A judgment-debtor preferred various objections to stay a sale, but the Subordinate Judge rejected them, and ordered the sale. The judgment-debtor preferred an appeal against the Judge's order rejecting his petition of objections. *Held*, it might be dealt with as an appeal against confirmation of the sale—*Sonamonee Dassia* vs. *Motee Singh*, 14 W. R., 385.

Limitation.—Application under this section should be made within thirty days, but the Court may admit them after the period has expired, if sufficient cause be shewn—*Raj Coomar Singh* vs. *Lalljee Sahoo*, 18 W. R., 333; provided the sale has not been confirmed—*Poulson* vs. *Dunn*, 18 W. R., 11.

A suit to set aside an execution sale must be brought within one year from the date of confirmation—Act XV of 1877, Sch. II, cl. 12; unless the plaintiff in the second suit was a party to the execution proceedings in a different *character* from that in which he sues—*Kali Mohun Chuckerbutty* vs. *Anandmoni Dabee*, 9 C. L. R., 18.

Suit to set aside an order.—No regular suit lies to set aside an order under this section, by a party to the proceedings—*Sreemunto Puramanick* vs. *Obhoy Churn Manna*, 11 W. R., 297; *Viraraghava Ayyangur* vs. *Venkata Churyar*, I. L. R., 5 Mad., 217; if an irregularity occurs in the course of the proceedings it must be raised by a party in execution, and not by regular suit—*Mudun Mohun Ghose Hazra* vs. *Boroda Sondori Dasia*, 8 C. L. R., 261; unless the person has been a party to the suit in a representative capacity only—*Kali Mohun Chuckerbutty* vs. *Anandamoni Dabee*, 9 C.L.R., 18; *Collector of Monghyr* vs. *Hyder Narain Shahee*, I. L. R., 5 Cal., 435; but if an order has been passed on grounds not warranted by the section, such as refusing to confirm a sale because a re-sale would be advantageous to all the parties, it may be contested in a regular suit by the bidder whose rights have been injuriously affected—*Amrit Misser* vs. *Gurda Pardan*, 7 Alla., 183; and a suit will lie by the auction purchaser if the sale is not confirmed for insufficient reasons—*Sukhai* vs. *Daryal*, I. L. R., 1 Alla., 375; *Azemudden* vs. *Baldeo*, I. L. R., 3 Alla., 554.

Regular suit to set aside sale.—A regular suit will lie to set aside a sale, although confirmed by Court, for any other cause than that it has been irregularly conducted—*Jummal Ali* vs. *Tirbhee Lall Dass*, 12 W. R., 41; such as that the property sold is outside the jurisdiction of the Court—*Syud Nawab Ali* vs. *Shaikh Uzir Mahomed*, 23 W. R., 233; *Kodoo Mundul* vs. *Shushee Shikhur Sircar*, 16 W. R., 227; or that the purchaser has notice that the decree is being executed *benamee* by one of the judgment-debtors—*Diyam-*

buree Debia vs. *Eshan Chunder Sein*, 15 W. R., 872; or that the sale has taken place under a decree passed without jurisdiction—*Lalla Goondur Lall* vs. *Hubeeboonissa*, 15 W. R., 311; *Jodu Nath Kundu Chowdhry* vs. *Braja Nath Kundu*, 6 B. L. R. App., 90, or barred—*Padarutt Lall* vs. *Ruttun Singh*, 5 Alla., 242; *Golam Asgur* vs. *Luckee Monee Debee*, 13 W. R., 273, or from any other cause not in full force; and execution cannot issue on it—In the matter of *Mahomed Hossein*, 9 C. L. R., 53; I. L. R., 7 Cal., 91; or has been passed by a Court without jurisdiction—*Kanhaye Singh* vs. *Oomadhur Bhutt*, 21 W. R., 291; or though the decree has been properly made the property sold is not within the Court's jurisdiction at the time of sale—*Narayanasawmy Naick* vs. *Saravana Mudaly*, 6 Mad., 58; or under a decree against a minor based on a mortgage by his guardian, who exceeded his authority in mortgaging, did not defend the suit, and the purchaser had notice of the same—*Debee Dutt Shahoo* vs. *Subdra Bibee*, 25 W. R., 449; *Jungee Lall* vs. *Shum Lall Misser*, 20 W. R., 120; or where the guardian acted fraudulently and confessed judgment, though in this case the purchaser, not having notice, was allowed a lien for the advances made—*Lalla Bunseedhur* vs. *Koonwur Bindeseree Dutt Singh*, 10 Moore, 454; but see *Ram Jewun Lall* vs. *Sham Lall Misser*, 20 W. R., 123; or it is in accordance with the principles of justice, equity and good conscience that it should be set aside against a purchaser without notice—*Abdool Hye* vs. *Nawab Raj*, 9 W. R., 197; but it has been held, a sale under a decree obtained by fraud will not be set aside—*Jugal Kishore Bannerjee* vs. *Abhya Charn Sarma*, 1 B. L. R., 84; unless the purchaser is implicated—*Umbika Churn Chuckerbutty* vs. *Dwarkanath Ghose*, 8 W. R., 506; *Mohesh Chunder Bagchee* vs. *Dwarkanath Moitro*, 24 W. R., 260; *Mahomed Kuzulbash Khan* vs. *Mahomed Shah*, 2 W. R., 49 (see as to collusion between the creditor's agent and the purchaser—*Roy Nandipat Mahata* vs. *Urquhart*, 4 B. L. R., 181; *Kishore Chunder Sein* vs. *Kally Kinkur Paul Chowdhry*, 20 W. R., 333; *Gobind Chunder Mookerjee* vs. *Ram Komul Chatterjee*, 25 W. R., 364); or the decree has subsequently been set aside on appeal—*Beharee Lall* vs. *Rajah Ram*, 6 Alla., 291; *Pearee Monee Dossee* vs. *Collector of Beerbhoom*, 8 W. R., 300; *Chunder Kant Surmah* vs. *Bissesur Surmah Chuckerbutty*, 7 W. R., 312; or on re-hearing—*Jan Ali* vs. *Jan Ali Chowdhry*, 1 B. L. R., 57; or the decree was *ex-parte*, and passed without summons having been served according to the terms of the Code—*Mackintosh* vs. *Kalee Doss Mullick*, 19 W. R., 234; unless it has been set aside before the sale has been confirmed—*Basappa* vs. *Dundaya*, I. L. R., 2 Bom., 540; in the matter of *Mahomed Hossein*, 9 C. L. R., 53, I. L. R., 7 Cal., 91; or the judgment-creditor is the purchaser; as it is said he purchases subject to the result—*Sadasivayyar* vs. *Muttu Sabapathi Chetti*, I. L. R., 5 Mad., 106.

If, at the time of a sale in execution, a private purchaser makes and afterwards withdraws an objection to the sale, he is not prevented from bringing a suit to set it aside. Had he not formally objected no doubt could be entertained of his right to institute a suit; and the making and afterwards withdrawing the objection can have no greater effect than would have followed the abstaining from making it—*Kumarasamy Reddi* vs. *Pana Soona Mooroogappa*, 7 Mad., 359.

Stamp.—In a suit to set aside an auction sale the plaint must be stamped as if the suit were for the recovery of the property—*Drapu Chowdhry* vs. *Ishan Chunder Das*, 9 C. L. R., 231.

Appeal.—If the auction-purchaser is made a party to the proceedings, he can appeal if the sale is set aside—*Gopal Sing* vs. *Dular Kuar*, I. L. R., 2 Alla., 352; *Kanthi Ram* vs. *Bankey Lal*, I. L. R., 2 Alla., 396.

No saleable Interest.—Ordinarily a first sale under a second attachment passes all the interest of the judgment-debtor—*Chutka Panda* vs. *Goburdhone*, 6 C. L. R., 85; *Obhoy Churn Coondoo* vs. *Golam Ali*, I. L. R., 7 Cal., 410; but where a mortgagee in a suit to enforce his lien obtained a decree for sale prior to attachment of the property included in the mortgage, under a rent decree it was held that the debtor had no saleable interest in the property to pass in execution of the rent decree, and the purchase-money should be re-funded—*Naharmul Marwari* vs. *Sadut Ali*, 8 C. L. R., 468. If the purchaser knew that the debtor had no saleable interest in the property the sale should not be set aside—*Mahabir Prasad* vs. *Dhuman Das*, I. L. R., 3 Alla., 527. See also *Dorab Ally Khan* vs. *Abdool Azeez*, I. L. R., 5 Ind. App., at p. 129.

A sale in execution of a decree by a Mofussil Court of property within its jurisdiction will pass a good title to the purchaser, notwithstanding that at the time of such sale the Sheriff was in possession of the property under a writ of *fieri facias* issued subsequently to 1865—*Grish Chunder Das* vs. *Brojo Jibun Bose*, 8 C. L. R., 4.

Application to set aside sale on ground of judgment-debtor having no saleable interest.

313. The purchaser at any such sale may apply to the Court to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest there-

in, and the Court may make such order as it thinks fit: provided that no order to set aside a sale shall be made, unless the judgment-debtor and the decree-holder have had opportunity of being heard against such order.

This section applies to H. C. See 5 Bom., 83.

This section enables the Court to relieve the purchaser in a summary way when it appears the whole of the consideration has failed. He would ordinarily lose his purchase-money and be liable to a civil suit by the real owner of the property for the property or its value—*Mohanund Holdar* vs. *Akial Mahaldar*, 9 W. R., 118; *Sham Soondur Doss* vs. *Raheem Buksh*, 6 Alla., 252; *Hera Lal* vs. *Karimunnessa*, I. L. R., 2 Alla., 780; *Ram Narain* vs. *Mahtab*, I. L. R., 2 Alla., 828. See, however, *The Court of Wards* vs. *Gaya Persad*, I. L. R., 2 Alla., 107; *Dorab Ali Khan* vs. *Abdool Azees*, L. R., 5 Ind. App., at p 128. The decree-holder is liable for damages on account of the wrongful execution—*Kalee* bin *Visaj* vs. *Damodur Gobind*, 9 Bom., 92; *Kanaye Pershad Bose* vs. *Hur Chand Manoo*, 14 W. R., 120.

A second sale should never be allowed of lands as a debtor's property when the same lands have already been sold under another decree against him, and the sale confirmed—*Saroda Prosad Mullick* vs. *Luchmeput Singh Doogar*, 7 W. R., 289.

The power of a Civil Court to set aside a sale summarily is limited to irregularities in the proceeding or in the sale, and to the case of the debtor possessing no saleable interest in the property sold; whereas the power of a Court in a regular suit is limited only by the principles of justice and equity—*Abdul Hye* vs. *Nawab Raj*, Ben. F. B. R., 911.

Confirmatfon of sale.

314. No sale of immoveable property in execution of a decree shall become absolute until it has been confirmed by the Court.

This section applies to H. C.

A Judge cannot set aside a sale which has been completed, where there has been no irregularity nor any default of the purchaser—*Adurmonee Dossee* vs. *Kaminee Soonduree Debia*, 3 W. R., Act X, 145. A lunatic's wife and manager of his estate purchased and the sale was confirmed, but the Judge refused to give her possession until she furnished security to protect the lunatic and subsequently re-sold the property. The Privy Council held that no second sale should have been allowed after the first had been confirmed—*Saroda Prosad Mullick* vs. *Luchmeput Singh Doogar*, 17 W. R., 289. Certain representative judgment-debtors objected to the sale of certain property and claimed it as their own. Their objections were disallowed, and they appealed to the High Court; but before the appeal came on for hearing the sale was confirmed as regards a portion of the property, and it was held that the sale having been confirmed for a long time could not be set aside, but that the petitioner's title to the unsold portion should be tried—*Pootee Begum* vs *Maharanee Indurjeet Kooer*, 12 W. R., 201. See also *Mahomed Hossein* vs. *Kokil Singh*, I. L. R., 7 Cal., 91. But where a sale of certain immoveable property took place after an order postponing the sale had been passed, but before it reached the officer conducting the sale, and it was confirmed, it was held that the Court would, on application of the decree-holder review the order and set aside the sale—*Mian Jaun* vs. *Man Singh*, I. L. R., 2 Alla., 686.

When a decree directs the sale of A's property first and then of B's, if the decree-holder is unable, from opposition, to sell A's property and proceeds against B's but cannot realise his decree therefrom, he has not lost his right to re-attach and sell A's property—*Stephenson* vs. *Unnoda Dossee*, 6 W. R., Mis., 18.

As to the effect of an absolute sale relating back, compare this section with Gilbert on uses 205—9, 495, 498.

If sale set aside, price to be returned to purchaser.

315. When a sale of immoveable property is set aside under section 312 or 313,

or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it,

See *Dorab Ally Khan* vs. *Abdool Azees*, L. R., 5 Ind. App., at p. 128.

the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The re-payment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money.

This section applies to H. C.

Until the sale has been set aside no action can be taken under this section. Where plaintiff, a purchaser under Act VIII, 1859, who, on proceeding to take possession, was opposed by defendant who claimed the property as his own, brought a suit for a refund of the purchase-money under this section, the sale still remaining uncancelled, it was held that no such suit would lie—*Bisseswar Panday* vs. *Bhagwan Dasi*, 3 B. L. R., 301.

The purchaser is entitled to receive back his purchase-money with or without interest as the case may require; generally, interest at 6 per cent. is allowed—*Abdool Hye* vs. *Macrae*, 23 W. R., 1; he should not be charged with the expenses of the sale —*Mussamut Hurdi Beebee* vs. *Baboo Surjoo Pershad*, 6 Alla., 309; he should be allowed the money laid out by him for the benefit of the property, but he must account for the rents and profits—*Morgan* vs. *Abdool Hye*, 23 W. R., 393; *Maharâjah Mitterjeet Singh* vs. *The Heirs of the Widow of Juswant Singh*, 3 Moore, 42.

The compensation should usually be paid by the person directing the sale—*Maharajah Ishuree Pershad Narain Singh* vs. *Lall Chutterput Singh*, 3 Moore, 100.

It has been held under Act VIII that if the Court reversing the sale omit to order re-payment of the purchase-money the purchaser could sue to recover it in a regular suit—*Greesh Chunder Pottar* vs. *Sookhoda Moyee Dabee*, 1 W. R., 55; *Brojendur Roy Chowdhry* vs. *Jugurnath Roy*, 6 W. R., 147.

If there is not a total failure of consideration, or the purchaser bought with a knowledge of a defect in the jurisdiction of the officer carrying out the sale, it is probable he will not succeed in recovering his purchase-money in a regular suit see *Dorabally Khan* vs. *Abdool Azeez*, L. R., 5 Ind. App., at p. 128.

Certificate to purchaser of immoveable property.

316. When a sale of immoveable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: provided that the decree under which the sale took place was still subsisting at that date.

This section applies to H. C.

In Bombay the granting of a sale certificate is a condition precedent to a right of action in respecting the property vesting in the purchaser—*Harkisandas Narandas* vs. *Bai Ichha*, I. L. R., 4 Bom., 155; though if the purchaser has obtained possession, and time be not of the essence of the arrangement, the certificate may be filed after the institution of the suit—*Kreshnaji Raoji* vs *Ganesh Bapaji*, I. L. R., 6 Bom., 139; but in Calcutta the proceedings confirming a particular auction sale are sufficient evidence of the sale independently of the sale certificates—*Benodi Lal Ghose* vs. *Tamizuddin*, 7 C. L. R., 115; and if in a suit a sale is admitted no certificate is necessary—*Doorga Narain Sen* vs. *Baney Madhab*, I. L. R., 7 Cal., 99, 207.

Immoveable property.—The words "immoveable property" have not been defined in the Act; in questions concerning the rights of Hindus they will probably be taken to include whatever the Hindu law classes as immoveables such as a "*hak*" in Bombay—*Maharana Fatesangji* vs. *Desai Kallianrayaji*, 10 Bom., 281. A decree for the sale of mortgaged property was attached and sold: *Held*, the purchaser should here get a certificate as he bought not merely the paper but the interest in the immoveable property recoverable under the decree, and that such interest must be regarded as immoveable property within this section—*Hari Govind Joshi* vs. *Ramchundra Pandurang Joshi*, 9 Bom., 64.

Section 259, Act VIII 1859, declared that the "certificate shall be taken and deemed to be a valid transfer" of the right, title and interest of the judgment-debtor. It was held, in connection with this section, that the certificate should be construed without reference to external evidence—*Mookhya Hurruchraj Joshee* vs. *Ram Lall Gomashta*, 14 W. R., 435; *Lalla Bissessur Dyal* vs. *Doolar Chand Sahoo*, 22 W. R., 181; *Shaikh Kuleemooddeen Darogah* vs. *Ashruf Ali Khan*, 19 W. R., 276 (disapproving of *Manson* vs. *Golam Kabria Moonshee*, 15 W. R., 490); unless it is necessary to enquire what is the meaning of the words used in the certificate—*Manager of the Raj Durbungah* vs. *Maharajah Coomar Ramaput Singh*, 17 W. R., 459; or there has been a description in it which is partly correct and partly incorrect—*Mussamut Maleebun* vs. *Mussamut Rasseda*, 25 W. R., 401; *Ram Gopal Barick* vs. *Shib Pershad Sircar*, 12 W. R., 483. In *Baluk Doss* vs. *Nimaye Chunder Sircar*, 17 W. R., 511, oral evidence was admitted to contradict the sale certificate. In *Mulji Bechar* vs. *Anupram Bechar*, 7 Bom., 136, it was held that a certificate for property above 100 rupees in value, being a conveyance, should be registered, if not, it would be inadmissible in evidence, and oral evidence of the sale could not be received; and in Bombay, Madras and Allahabad sale certificate under Act VIII of 1859, section 259 are invalid if not registered—*Harkisandas Narandas* vs. *Bai Ichha*, I. L. R., 4 Bom., 155; *Kunahia Lal* vs. *Kali Din*, I. L. R., 2 Alla., 393; *Srinarasa Sastri* vs. *Seshayyangar*, I. L. R., 3 Mad., 37; otherwise in Bengal—*Prokash Chunder Dass* vs. *Tarachand Das*, I. L. R., 9 Cal., 82. See also *Abdool Aziz Biswas* vs. *Radha Kanto Kobiraj*, I. L. R., 5 Cal., 227. In dealing with certificates under this Act it should be borne in mind that they no longer are looked on as deeds transferring title, so that possibly they need not be registered or stamped, and may not exclude oral evidence of the purchase. Referred case, 8 Mad., 112.

When a party buys a specified talook with the additional description that the talook contains so much land, his title extends to the whole land in the talooks though it may be more than the amount declared—*Ameeroonissa Khatoon* vs. *Kumolakant Roy*, 14 W. R., 117.

When a tenure has been sold and sale certificate granted, the presumption is that the purchase-money has been paid—*Fyazoodeen Bhooya* vs. *Shamsunnissa Beebee*, 12 W. R., 508.

A sale certificate should not be amended—*Rajah Rughoo Nundun Singh Bahadoor* vs. *Wilson*, 23 W. R., 301.

Rights and liabilities of Auction purchasers—A purchaser in execution has an inchoate right in the property between the date of sale and the date of confirmation, which may be destroyed by great laches on his part in seeking confirmation—*Konapa* vs. *Jonardan Sukdev*, 11 Bom., 193; he must be repaid any moneys honestly advanced during that period for the preservation of the estate, if the sale is set aside—*Rajah Hossein Buksh Khan* vs. *Baboo Roy Dhunput Singh*, 18 W. R., 289; and on confirmation his rights relate back to the time of sale—*Raja Luchmin Nath* vs. *Maharaja of Vizianagram*, 7 Alla., 310; *Black* vs. *Homersham*, 4 Ex. Div., 24; so that if A's property is sold twice in execution the first purchaser has priority, though his purchase has not been the first confirmed—*Konapa* vs. *Janardan Sukdev*, 11 Bom., 193. No title is guaranteed to him beyond that he shall have the rights and interests in the property which belong to the judgment-debtor, or in other words that the judgment-debtor shall not recover back the lands—*Sowdamini Chowdhrain* vs *Krishna Kishor Poddar*, 4 B.L.R., 11; and that if the judgment-debtor, or his heirs recover the property they cannot hold against him—*Deonarain Sing* vs. *Tokhun Singh*, 5 W. R., 30, unless they can claim adverse possession for more than 12 years. He is bound to satisfy himself of the value and quality of the property as if he was purchasing from a private person—*Jummal Ali* vs. *Tirbhee Lall Doss*, 12 W. R., 41; *Shaikh Mahomed Basirulla* vs. *Shaikh Abdulla*, 4 B. L. R., App., 35; and except in cases falling within section 312 or 313, or where the judgment-debtor has no saleable interest—*Shib Lall* vs. *Lochun Singh*, 3 Agra, 7; *Mussamut Doolhin Hurnath Koonwaree* vs. *Baijhoo Oojha*, 2 Agra, 50; *Bank of Hindustan* vs. *Premchand Raichand*, 5 Bom., O. C., 83, and the sale has been set aside—*Krishnapa* vs. *Ponchapa*, 6 Bom., 258, the purchaser cannot recover any portion of his purchase-money, unless there has been fraud—*Huronath Roy* vs. *Muthoorunath Acharjee*, 7 W. R., 4; *Dhondu Mathuradas Naik* vs. *Ramji*, 4 Bom., 114, or

possibly, if the decree-holder knowing of a charge in the property sells it without any mention of the charge, and the purchaser is compelled to pay it off—*Douglas* vs. *The Collector of Benares*, 5 Moore, 271; and if the decree-holder has a lien on the property, and standing by allows it to be sold as unencumbered, he loses his lien against the purchaser—*Doollub Sircar* vs. *Kristo Coomar Bukshee*, 12 W. R., 303; 4 B. L. R., 407; especially if when asked he does not give full information—*McConnell* vs. *Mayer*, 2 Alla., 315. This position has been receded from by the Court at Allahabad in the case of *Baboo Neelkunth Sahee* vs. *Asmun Mahto*, 2 Alla., 67. In that case the purchaser bought the right, title and interest of A and his minor brother B, and subsequently B got the sale set aside as regards him, in consequence of his minority and the absence of necessity for contracting the mortgage which formed the basis of the decree. The Court laboring under the difficulties of the term saleable held the purchaser could follow the decree-holder and judgment-debtor for a proportionate part of the purchase-money according tothe moneys that had come into their hands. See in regard to this case, *Ram Narain Singh* vs. *Mahtab Bibi*, I. L. R., 2 Alla., 828.

If the property sold does not belong to the judgment-debtor, nothing passes by the sale—*Kishen Chunder Ghose* vs. *Mussamut Ashooran*, Marsh., 647: if the debtor has any interest in it the purchaser gets it—*Bhukan Bhaibava* vs. *Bhaiji Prag*, not as it stood at the moment of sale, but as attached and notified for sale—*Ram Onoogroho Singh* vs. *Mussamut Montoran*, 6 W. R., 223. It has been held that what the debtor possessed on the date of the sale notification passes—*Soojaut Ali Khan* vs. *Koosal Chand*, S. D., N. W., 1864, 561, unless the interest of the right is expressly described, and then only to that extent—*Mussamut Azadee* vs. *Mussamut Azmere Koonwar*, 1 Agra, 282, and that where there is a difference between the notification of sale and the sale certificate, the conditions of the notification are taken as of superior authority—*Uma Churn Sen* vs. *Gobind Chunder Mozumdar*, 1 C. L. R., 460; but the better contention is that where there is any difference between the order of sale and the certificate the latter will prevail unless the purchaser has notice of the difference—*Gouree Komul Bhuttacharjee* vs. *Surat Chunder Dass Biswas*, 22 W. R., 408; see, however, *Assamathemnessa* vs. *Roy Lutchmeput*, I. L. R., 4 Cal., 142; *Dorabally Khan* vs. *The Executors of Khajah Moheeroddeen*, I. L. R., 3 Cal., 806; and the right of the purchaser is confined to the right, title and interest of the debtor which were seized and sold with all its defects—*Dorab Ally* vs. *Abdool Azeez*, L. R., 5 Ind. App., 125; *Deendyal Lal* vs. *Jagdeep Narain Singh*, 1 C. L. R., 49; *Ram Tuhul Singh* vs. *Biseswar Lall Sahoo*, L. R., 2 Ind. App., 131; and though a tenure may be sold for its own arrears yet if only the right, title and interest of the debtor is seized and sold the purchaser obtains no more—*Doolar Chand* vs. *Lall Chand*, 3 C. L. R, 561. The purchaser cannot seek to recover what the debtor could not—*Zalim* vs. *Choonee Lall*, 4 Agra, 194; is subject to limitation against him—*Shridhar Vinayak* vs. *Babaji*, 6 Bom., 220; and buys subject to all liens, mortgages and leases existing—*Oojagur Roy* vs. *Ram Khalawan Singh*, 10 W. R., 384, claims for rent—*Obhoy Chunder* vs. *Nilambar Mookerjee*, W. R., 1864, 72; *Shiekh Khoda Buksh* vs. *Digambaree Dossee*, W. R., 1864, 207 and revenue—*Chatraput Singh* vs. *Grinda Chunder Roy*, I. L. R., 6 Cal., 389; *Ram Soondar Shaha* vs. *DeLanney*, 17 W. R., 25; and if he has notice of a charge and does not pay it, he will be held liable for all the costs incurred in enforcing the security—*The Land Mortgage Bank* vs. *Ram Ruttan Neogy*, 21 W. R., 270; on the other hand he is entitled to all rents falling due after the date of purchase—*The Collector of Rajshaye* vs. *Hur Soondery Dabea*—W. R., 1864 (Act X) 6; the crops unless there is a custom to the contrary—*Afatoolla Sirdar* vs. *Dwarkanath Moitry*, I. L. R., 4 Cal., 814, 4 C. L. R., 95; *Land Mortgage Bank* vs. *Vishnu*, I. L. R., 2 Bom., 670; to the trees unsevered—*Faqueer Soonar* vs. *Mussamut Khuderun*, 2 Alla., 251; but see *Nilambar Biswas* vs. *Joy Durga Dabee*, 2 Sev., 53; *Chuttar Bhuj Raj* vs. *Villayet Ali*, W. R., 1864, p. 223; *Shaik Abdool* vs. *Dataram*, W. R., 1864 p. 367; and to a right of easement against the debtor as if he had voluntarily sold it—*Huree Madhub Lahiree* vs. *Hem Chunder Gossamee*, 22 W. R., 522; but where a decree-holder, who had attached certain land and a house upon it, caused the land to be sold in execution and purchased it, and then caused the house to be sold to a third party, it was held that he had purchased the land on which the house stood subject to the right of the person who bought the house to have it continued there—*Mookta Soonduree Chowdhrain* vs. *Mothooranath Ghose*, 22 W. R., 209. As to other cases of estoppel see p. 279, *ante*.

An auction-purchaser is not estopped from putting up a title independent of that based on his purchase—*Pandit Hanuman Dat* vs. *Mufti Assadullah*, 7 Alla., 145. He is looked on as a purchaser for value even though he be the judgment-creditor—*Brojendro Coomar Roy Chowdhry* vs. *The Chairman of the Dacca Municipality*, 20 W. R., 223; and can carry on any pending suit connected with the purchased property—*Wil-*

son vs. *Government*, 12 W. R., 122; but he differs in many important points from that of a private purchaser—*Dinendronath Sannyal* vs. *Ram Coomar Ghose*, L. R., 8 Ind. App., 65; *Alukmonee Debee* vs. *Bani Madhub*, I. L. R., 4 Cal., 677. Without notice, he is not bound by an agreement to mortgage made by the judgment-debtor—*Bhuggobutty Dossee* vs. *Shamachurn Bose*, I. L. R., Cal., 337; nor indeed by a statement made by the judgment-debtor on a previous occasion in a mortgage deed to which the auction-purchaser was himself a party—*Mussamut Imrit Kooer* vs. *Lalla Debee Pershad Singh*, 18 W. R., 200; nor generally for any mere personal objections of the debtor. Thus where A as surety of B for a loan sued C as the purchaser at a sale in execution of the rights and interest of B in a bond pledged for the debt, on the ground that he had purchased the bond with all its liabilities and amongst them was the amount due to A by B. *Held*, C not being a party to the loan transaction was not personally liable—*Shibjoy Thakur* vs. *Pogose*, S. D., 22nd Aug. 1860.

After 12 years' possession he is free from all claims by a mortgagee—*Anundo Moyee Dossee* vs. *Dhonendro Chunder Mookerjee*, 14 Moore, 111; 16 W. R., 19; *Manly* vs. *Patterson*, I. L. R., 7 Cal., 394; he is entitled to question the fraudulent acts and alienations of the judgment-debtor in fraud of the decree—*Shaikh Baichoo* vs. *Howard*, 3 Agra, 15; and in some cases in the North-West has been elevated to a position very analogous to that of a creditor—*Oomrao Singh* vs. *Shimboo Nath*, 2 Alla., 88; *Alfatun* vs. *Rao Karan Singh*, 7 Alla., 362, but the distinction is well marked in Bengal—*Lalla Ram Surun Lall* vs. *Mussamut Lokebas Kooer*, 18 W. R., 39. He can claim a partition if the debtor was a member of an undivided family governed by mitakshara law—*Baboo Deendyal Lal* vs. *Baboo Jugdeep Narain Sing*, 1 C. L. R., 49; and if the judgment-creditor had been a mortgagee or holder of any other charge on the property, and he sells it under a money bond, the purchaser without notice gets it free of the mortgage or lien—*Bhuggobutty Dossee* vs. *Shamachurn Bose*, I. L. R., Cal., 353; *Dolee Chund* vs. *Mussamut Oomda Begum*, 24 W. R., 263; but he cannot claim the benefit of the law that an unregistered mortgagee without possession is not valid against a subsequent purchaser in possession—*Ganpat Bajashet* vs. *Khandu Chaugshet*, 4 Bom., 69; *Mathuradas Ranchoddas* vs. *Kalila Khushal*, 7 Bom., 24. As to a case of no lien, see *Syed Woozeer Alleul Hossennee* vs. *Mussamut Luckee Bebee*, 1 W. R., 143.

Purchaser under money decree on mortgage bond.—By section 99 of Act XIV of 1882, which came into force on the 1st of July, 1882, sales of mortgaged property under money-decrees are prohibited. The following note is allowed to remain as questions will still crop up in connection with this subject. Great difficulty has been experienced in determining the rights of purchasers in sales under money-decrees on mortgage bonds. It appears to have been the practice of the Courts to allow a mortgagee to sue for the money, and subsequently sue to follow the property. In other words, that the mortgagee could sell the rights of redemption first and enforce the mortgage. This has ceased to be law in Bengal, and the later decisions distinctly declare that a right of redemption is not saleable by the mortgagee—*Bhuggobutty Dassee* vs. *Shama Churn*, I. L. R., Cal., 353; and that where he is the judgment-creditor and sells the mortgaged property under a money-decree on the mortgage bond, he transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor; and if there is no third party interested in the property, it becomes vested absolutely in the purchaser; as it stood when he was making the mortgage, and not as it stood at the time of sale—*Shaikh Abdulla* vs. *Haji Abdull*, I. L. R., 5 Bom., 8; but see *Ramanath Dass* vs. *Boloram Phookan*, I. L. R., 7 Cal., 677, and no second suit to follow it will lie—*Dabee Dass*, Petitioner, 23 W. R., 196; but if the property has been alienated some time since the mortgage, voluntarily or by law, the mortgagee may bring a suit against the alienees to have his lien declared and to sell the property—*Syud Emam Momtazooddeen Mahomed* vs. *Raj Coomar Dass*, 23 W.R., 187; 14 B.L.R., 409; *Gopeenath Singh* vs. *Sheo Sahoy Singh*, 1 W. R., 315; *Byjnath Singh* vs. *Goburdhon Lall Mohasohree*, 24 W. R., 210, even though he has become the purchaser under his money-decree—*Jonmejoy Mullick* vs. *Dossmoney Dossee*, I. L. R., 7 Cal., 714; *Venkatanarsammal* vs. *Ramial*, I. L. R., 2 Mad., 108. In the North-West if a person sued on different bonds, a money-decree on a later bond would not bar a second suit on a prior mortgage—*Juggun Nath* vs. *Komal Singh*, 3 Alla., 123.

The result of these decisions is, that in this country the mortgage lien is not extinguished by a money-decree; but remains to protect the purchaser—*Syud Nadir Hossein* vs. *Baboo Pearoo Thovildarinee*, 19 W. R., 255; *Ram Churn Lall* vs. *Rughoobeer Singh*, 11 W. R., 481; even though the purchaser be mortgagee—*Aruth Soar* vs. *Juggunnath Mohadpattur*, 23 W. R., 460; and this seems to be the view in the North-West—*Rajah Ram* vs. *Bainee Madho*, 5 Alla., 81. In Madras also the High Court has held that a prior mortgagee, who purchases under a money-decree on the mort-

gage my use his prior mortgage as a shield to protect his interests against a subsequent incumbrancer; but the reasoning is not similar to that of the Calcutta Court —*Ramu Naikun* vs. *Subbaraya Mudali*, 7 Mad., 229.

A purchaser at a sale under a decree recovered by a mortgagee is not bound by leases made by the mortgagor, unless he has recognised the lessees as his tenants—*Mussamut Koomeeroonnissa* vs. *Hunooman Dass*, Marsh., 122; but see *Bainee Pershad* vs. *Reet Bhunjun Singh*, 10 W. R., 325.

It is difficult to reconcile the theory that the purchaser under a money-decree on a mortgage bond obtains the benefit of the creditor's lien with the decisions of the Privy Council. In *Nugender Chunder Ghose* vs. *Sreemutty Kaminee Dossee*, 11 Moore, 241, the broad doctrine was laid down that, where a mortgagee gets a money-decree against a widow for a sum that might have been tacked on to a mortgage bond, only the widow's property or interest could be affected, and the estate of the last full owner could not be sold, though at the same time the Court distinctly declared that the widow, in a suit to recover or charge an estate, represented the full owner; and in *Baijun Doobey* vs. *Brij Bhookun Lall Awusti*, L. R., 2 Ind. App., 275, the same doctrine was extended to a purchaser. In that case a decree was obtained against a widow for maintenance, which is, under mitakshara law, a charge on the estate, and it was held that a purchaser under the decree obtained only the life interest of the widow and not the whole estate. Having referred to the notification of the sale which declared that only the right, title and interest of the judgment-debtor was sold, their Lordships proceed as follows: "The real question is what was liable to be sold under the decree and what in fact was sold. The purchaser may have made a mistake. He may have thought that the Court was selling something which it did not sell, but he was informed distinctly by the notification that the Court was selling the interest of the defendant in the estate, and that beside that interest no other interest was being sold. The plaintiff, having purchased the interest of the judgment-debtor, obtained a certificate of the purchase, which stated that whatever right, title and interest the judgment-debtor had in the said property had ceased from the day of sale, and had become vested in the auction-purchaser. It appears, therefore, to their Lordships that what was intended to be sold was the widow's interest only and not the absolute estate in the lot, and that consequently upon the death of the widow the lot descended to the plaintiff as the reversionary heir of her husband, and that the purchaser did not obtain the absolute estate, but only the widow's interest on it, which continued only so long as the widow lived." These cases clearly shew that if a sum is a charge upon an estate, but the creditor elects to take a personal decree, all the purchaser obtains is the right, title and interest of the debtor—no lien passes —in short he gets a certainty that the judgment-debtor shall not recover back the lands—*Sowdamini Chowdhrain* vs. *Krishna Kishor Poddar*, 4 B. L. R., 15. Unless there is some distinction between liens arising by law and liens arising out of contract, the same reasoning must apply to purchasers under money-decrees on mortgage bonds. The Privy Council seem not to recognize any such distinction. In the case of *Deendyal Lal* vs. *Jagdeep Narain Singh*, L. R., 4 Ind. App., 247; 1 C. L. R., 49, A borrowed Rs. 5,000 from B and secured its re-payment by a mortgage bond. B having sued A obtained a money-decree, put up for sale the right, title and interest of the father in the joint property, and bought it in himself. *Held*, that the purchaser only obtained the right, title and interest of A, and could not use his mortgage to shield himself from the claim of the son to his share as a co-proprietor. Nor did the decision turn on whether or not there was "legal necessity" for the loan. In regard to it, their Lordships said: "This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the value of the debt the appellant cannot be taken to have acquired by the execution more than the right, title and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and to have made those parties co-sharers to it. By the proceedings which he took he could not get more than was seized and sold in execution, *viz.*, the right, title and interest of the father." The test then in deciding the right of the purchaser is what has been seized and sold in execution, and nothing passes to him from the judgment-creditor. Moreover most of the decisions of the High Court could be supported on the well-known principle of estoppel and this is the view taken by the Bombay High Court—*Shaikh Abdulla* vs. *Haji Abdulla*, I. L. R., 5 Bom., 8; *Hari* vs. *Lakshman*, I. L. R., 5 Bom., 618. Thus, if a person sells property covered by a mortgage and, suppressing the fact, obtains the full value of the property as unencumbered, he cannot afterwards say that the purchaser took it subject to the lien—*Douglas* vs. *The Collector of Benares*, 5 Moore, 271; see also *Salamat Ali* vs. *Budh Singh*, I. L. R., 1 Alla.,

303; so where, in execution of a money-decree, the decree-holder sold certain property which had been mortgaged to him by a registered bond, without notice of the existing lien, and afterwards obtain a decree on the mortgage bond which he transferred to a third party: *Held*, that neither the mortgagee nor his transferree could follow the property previously sold—*Dullab Sirkar* vs. *Krisna Kumar Bakshi*, 3 B. L. R., 407; and where a mortgagee elects to take a money-decree, sells property mortgaged as unencumbered and purchases it, he cannot enforce his lien against a *bonâ fide* purchaser for valuable consideration in possession, either in a regular suit or in execution—*Gopinath Singh* vs. *Sheo Sahay Singh*, Ben., F. B. R., 72; and the general rule is, not that the lien of a seller passes, any person who consents to the sale donation or other alienation of property but that to him or suffers it, or ratifies it, has no longer any lien on the property, unless he reserves it on the ground of fraud on the purchaser —*Domat*, B. III. Hi. 1, section 7, cl. 12; *Donlad* vs. *Suckling*, L. R., 12 B., 587; it is extinguished N. Y. Civ. Code, 1604.

Purchaser under Hindu Law.—The general rule is also modified by Hindu law. The purchaser of an undivided interest, during the life time of the debtor can now sue for a partition throughout India—*Deendyal Lall* vs *Jagdeep Narain Singh*, 1 C. L. R., 49; *Baboo Lall Jha* vs. *Sheikh Jumah Buksh*, 22 W. R., 116; in Bengal he can claim to hold jointly with the other members—*Kowar Bijoy Keshab Roy* vs. *Shamasundari*, Ben., F. B. R., 172; *Eshan Chunder Banerjee* vs. *Nund Coomar Banerjee*, 8 W. R., 239. At a sale under a decree against the sons for the debts of their father, according to the mitakshara law he gets the father's estate—*Girdharee Lall* vs. *Kantoo Lall*, 22 W. R., 56; I. L. R., 1 Ind. App., 321; *Mussamut Sham Soonder Koer* vs. *Mussamut Jumna Kooer*, 25 W. R., 148; id., 311; ed. 203; *Pundit Hait Ram* vs. *Mussamut Mulu*, 7 Alla., 110; and they cannot recover the property unless they shew that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted, and if the purchasers are strangers to the suit and have not had notice that the debts were so contracted, they are not bound to make enquiry beyond what appears on the face of the proceedings —*Suraj Bunsi Koer* vs. *Sheo Prasad*, L. R., 6 Ind. App., 88; but ordinarily, unless the property has been attached and ordered to be sold, a right to a share in joint ancestral property dies with the sharer and his previous share is no longer subject to execution in a mere money-decree, even though he may have died after the decree—*Suraj Bunsi Koer* vs. *Sheo Prasad Singh*, L. R., 6 Ind. App., 88; *Mussamut Luchmee Doi Kooree* vs. *Asman Singh*, 25 W. R., 421. In other cases it is only where it is manifest that the judgment-debtor has been sued in a representative capacity that the Court will allow a sale in terms of the interests of the judgment-debtor to convey the interests of others—*Loki Mahton* vs. *Ajaib Lal*, 4 C. L. R., 465, *Deen Dyal* vs. *Jugdeep Narain*, L. R., 4 Ind. App., 247; *Doolar Chand* vs. *Lall Chand*, 3 C. L. R., 561; *Nugender Chunder Ghose* vs. *Sreemutty Kamini Dossee*, 11 Moore, 241; so, he gets the estate under a decree against the widow for the debt of her husband—*Ishan Chunder Mitter* vs. *Buksh Ali Soudagar*, Marsh., 614; *Mussamut Phoolbas Koonwur* vs. *Lalla Jogeshur Sahoy*, 25 W. R., 285; if this fact appears in the decree—*Alekmonee Dabia* vs. *Bani Madhub*, I. L. R., 4 Cal., 677; or for rent due in his life time, and she is sued as guardian of her minor son—*Manager of Raj Durbhangha* vs *Maharajah Coomar Ramapat Singh*, 10 B. L. R., 295; and where the property is sold in satisfaction of several claims against her, some of which bind the estate, though she has a power to adopt and afterwards exercises it—*Rajah Debendro Narain Roy* vs. *Coomar Chundernath Roy*, 20 W. R., 30; the purchaser gets the full estate; but if the decree is for debts incurred in her life a purchaser under a money-decree only gets her life interest —*Baijan Doobey* vs. *Brij Bhookun Lall Awusti*, L. R. 2, Ind. App., 275; 24 W. R., 306. If the decree declares a charge on the estate, and it is justified by legal necessity, *Bristobehari Sahoy* vs. *Lala Biagnath Prasad*, 7 B. L. R., 213, the purchaser gets the estate, unless the widow does not properly defend the suit— *Bramomoyee Dossee* vs. *Krista Mohun Mookerjee*, I. L. R. 2 Cal., 222; or being only possessed of a limited interest in the estate, such as maintenance, she could not possibly represent it—*Ramsami Chetti* vs. *Saluckai Tevar*, 8 Mad., 186. But see the cases against this view, referred to in the note to section 252, *ante*, p.

The same law has been extended to Mahomedan widows, and it has been held that when the widows' right was advertised, and the debt was that of the deceased, the purchaser bought the deceased's interest—*Mussamut Nuzeerun* vs. *Ameerooddeen*, 24 W. R., 3. The necessity of the extension is not apparent and the propriety of it is doubtful, as Mahomedan widows do not take merely a life interest. See also the note under section 252, *ante*.

A mortgagee purchasing the mortgaged property becomes a trustee for the mortgagor—*Brojonath Kundu Chowdhry* vs. *S. M. Gobind Moni Dossee*, 4 B. L. R., 83;

a judgment-debtor purchasing the decree against himself and others, his only remedy is a suit for contribution—*Soroop Chunder Hazrah* vs. *Troylokhonath Roy*, 9 W. R., 231: *Khoshalee* vs. *Nund Lall*, 6 Alla., 1.

Decree-holder.—Where a Court, by declining to pay to the decree-holder the proceeds of an execution sale which has been confirmed, obliges him to take proceedings to satisfy the Court that there is no other possible claimant, such proceedings must be considered as proceedings to execute the decree—*Khajah Mahomed Hossein Khan* vs. *Syud Lootf Ali Khan*, 18 W. R., 463.

Limitation.—The provisions of the Limitation Act do not apply to applications for certificates of sale—*Kylasa Goundan* vs. *Ramasami Ayyan*, I. L. R., 4 Mad., 172, and if even they did, a sale certificate in granted after time would be valid and a subsequent judge could not go behind it—*Vithal Janardan* vs. *Vithojiraw*, I. L. R., 6 Bom., 586.

Bar to suit against purchaser buying benami.

317. No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims.

Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser.

This section applies to H. C.

This section only refers to suits between the benamdar and the beneficial owner —*Seetanath Ghose* vs. *Madhub Narain Roy Chowdhry*, 1 W. R., 329; and where the beneficial owner sues the certified benamdar for possession—*Mirza Khyrat Ali* vs. *Mirza Syfoollah Khan*, 8 W. R., 130. It does not apply to suits brought by the certified purchaser against a party in possession, and if the certified purchaser is a benamdar, or an agent, and the real purchaser obtains possession of the property honestly, the former cannot dispossess the latter—*Mussamut Buhuns Kowur* vs. *Lalla Buhooree Lall*, 14 Moore, 497; *Lokhee Narain Roy Chowdhry* vs. *Kaly Puddo Bandopadhya*, L. R., 2 Ind. App., 154; *Muthoora Nath Doss* vs. *Raiekomul Dossee*, 24 W. R., 279; *Syud Wassel Ruhman* vs. *Golam Russool*, 22 W. R., 270. What is meant by the words certified purchaser has not been fully settled. A person whose name has been entered in the certificate by fraud or contrary to the wishes of the purchaser is not—*Mussamut Koosumba* vs. *Tufuzul Hossein*, 13 W. R., 85. But is a person who has purchased, but not obtained, his certificate? In the case of *Bodh Sing Doodhooria* vs. *Gunesh Chunder Sein*, 19 W. R., 356, their Lordships of the Privy Council said: "Their Lordships will not enquire whether there is sufficient proof that *Ramasoondar*, who purchased at an auction sale held a few days after the Act came into operation, did obtain a certificate under the Act or of its terms if he did obtain one; because, assuming him to have been a certified purchaser within the meaning of the Act, they are of opinion that the provisions of the section do not apply to such a case as the present." This would seem to assume the fact of a certificate having been given. But in *Bunda Ali Khan* vs. *Mussamut Bibee Ameerun*, 25 W. R., 493, it was decided that the party to whom the Court has directed a certificate to be granted is entitled to be regarded as the certified purchaser. The Privy Council ruling referred to above was not cited.

This section was designed to prevent disputes between the purchaser at an execution sale and a person claiming that the certified purchaser has purchased *benamee* for him. But where the certified purchaser admits that he purchased for another, there is no reason why that person should not set up his title upon the purchase, against a person not the certified purchaser, or claiming through him—*Mussamut Shorosutty Dassee* vs. *Gopeesoondery Dassee*, Marsh., 423. In a suit to recover possession of property purchased by plaintiff's benamidar brought against the benamdar (who admitted the claim) and the person in possession; it was held the suit was not barred, under this section—*Haji Arjun Mullick* vs. *Sheikh Farutulla*, 9 C. L. R., 295. It does not affect the rights of members of a joint Hindu family who, by

operation of law and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition however made by a member of the family in his sole name, if made by the use of the family funds—*Bodh Sing Doodhooria* vs. *Gunesh Chunder Sen*, 19 W. R., P. C., 356; *Achumbeet Roy* vs. *Sulabut Roy*, 6 W. R., 160; nor does it prevent a suit to declare that the name of the certified purchaser was inserted in the certificate of sale fraudulently and without the consent of the real purchaser—*Mussamut Gosmiah* vs. *Tafuzzal Hossein*, 4 B. L. R., App., 32; nor a suit by a third party not claiming to be real purchaser against the certificate holder to question the sale on the ground of fraud—*Mussamut Shama Keshee* vs. *Mussamut Raj Kissur*, 14 W. R., 179; nor a suit by a judgment-creditor, to declare that the property purchased by A belongs to his debtor B—*Sohun Lall* vs. *Lala Gya Pershad*, 6 Alla., 265. A sued B, and C's widow, on the ground that C had bought the right of B at an auction sale in certain property, and C's widow pleaded that her husband was the previous certified purchaser of B's rights; it was held that the Courts might enter on the question whether the purchase by C's husband was a benamee transaction by B—*Tara Soonduree Debee* vs. *Oojul Monee Dassee*, 14 W. R., 111; and where B purchased A's property at an execution sale benamee for A, and subsequently conveyed it to C for A's benefit, A's creditors were not prevented from following the property, though it was doubted if it could be followed in B's hands, on the principle that what A could not follow the creditors could not—*Satapa* vs. *Karbasapa*, 7 Bom., 21; and where plaintiff's property was sold under a decree, and the purchaser agreed in writing the day after the purchase to reconvey it to the plaintiff on payment of the purchase-money, it was held that section 260, Act VIII of 1859, did not apply—*Mor Joshi* vs. *Muhammad Ibrahim*, 10 Bom., 344.

Delivery of immoveable property in occupancy of judgment-debtor.

318. When the property sold is in the occupancy of the judgment-debtor or of some person on his behalf, or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property, and a certificate in respect thereof has been granted under section 316, the Court shall, on application by the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

This section applies to H. C.

A purchaser can obtain *khas* possession under this section, although in the first instance he obtained possession under section 319, *post*. The High Court cannot interfere with such an order under the Letters Patent—*Hur Kishore Audhicary* vs. *Sudoy Chunder Nundee*, 17 W. R., 80.

Where the right, title and interest of a party was sold, but possession was not given to the purchaser for 15 years afterwards, it was held that the former could not recover the property unless he proved 12 years' adverse possession—*Attotram Doss* vs. *Balunkee Doss*, 14 W. R., 357.

If the purchaser does not get physical possession of the property, in execution, when he is entitled to it, he cannot bring a suit for it on the ground that he had obtained symbolical possession—*Lolit Coomar Ghose* vs. *Ishan Chunder Chuckerbutty*, 10 C. L. R., 258.

Delivery of immoveable property in occupancy of tenant.

319. When the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a certificate in respect thereof has been granted under section 316, the Court shall order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the

property, and proclaiming to the occupant by beat of drum or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

This section applies to H. C.

This section does not prevent a person from getting possession, if he can, without the aid of the Court—*Obhoy Churn Dey* vs. *Rajendra Coomar Ghose*, 22 W. R., 406.

In practice the Courts of this country do not give possession under a sale in execution by removing a person who is in possession under an apparent *bonâ fide* title. If the debtor can assert his title to possession by suit only, the purchaser can have no higher claim—*Tarakant Bannerjee* vs. *Puddomoney Dossee*, 10 Moore, 483; but the decree and execution in the manner described in this section puts an end altogether to limitation—*Gunga Gobind Mundul* vs. *Bhoopal Chunder Biswas*, 19 W. R., 101; so far as any person who is a party to the proceedings is concerned—*Umbica Churn* vs. *Bholanath*, 4 C. L. R., 55; *Juggobundhu Mukerjee* vs. *Ram Chunder*, I. L. R., *Lokessur Koer* vs. *Purgun Roy*, I. L. R., 7 Cal., 418.

The purchaser must make his application within three years from the time the sale certificate is issued—*Basapa* vs. *Marya*, I. L. R., 3 Bom., 433.

Power to prescribe rules for transferring to Collector execution of certain decrees.

320. The local Government may, with the sanction of the Governor-General in Council, declare, by notification in the official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector, and rescind or modify any such declaration.

Notification.—When such a declaration has been made, the Civil Courts cease to have jurisdiction to execute the decree—*Ikbal Begam* vs. *Sham Sunder*, I. L. R., 4 Alla., 382.

For rules under this section, see *North-Western Provinces and Oudh Gazette*, 18th November, 1880. A decree for the sale of land or of an interest in it, is a decree for the recovery of money within these rules—*Beril* vs. *Rati Ram*, I. L. R., 4 Alla., 115. As to the effect of the rules, see *Hafizunnissa* vs. *Mahadeo Prasad*, I. L. R., 4 Alla., 116.

Power to prescribe rules as to transmission, execution and retransmission of decrees.

The local Government may also, notwithstanding anything hereinbefore contained, from time to time prescribe rules for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court.

This section applies to H. C.

Power of Collector when execution of decree is so transferred.

321. When the execution of a decree has been so transferred, the Collector may—

(*a*) proceed as the Court would proceed under section 305; or

(*b*) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(*c*) sell the property ordered to be sold or so much thereof as may be necessary.

This section applies to H. C.

Procedure of Collector when execution of decree so transferred.

322. When the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if, after such enquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

Notice to be given to decree-holders and to persons having claims on property.

322A. In the case mentioned in section 322, the Collector shall publish a notice calling upon—

(*a*) every person holding a decree for money against the judgment-debtor capable of execution by sale of his immoveable property, and which such decree-holder desires to have so executed, and every holder of a decree for money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder;

(*b*) every person having any claim on the said property, to submit to the Collector a statement of such claim, and to produce the documents, if any, by which it is evidenced.

Such notice shall be in the language of the district, and shall allow a period of sixty days from the date of its publication for compliance therewith. It shall be published by being posted in the court-house of the Court which made the original order under section 304, and at such other places (if any) as the Collector thinks fit. Where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

Amount of money-decrees to be ascertained, and immoveable property available for their satisfaction.

322B. Upon the expiration of the said period the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree holders or claimants

(if any) may desire to make, and for holding such enquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may, from time to time, adjourn such hearing and enquiry.

If there be no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

If any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order under section 304, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof be within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector. The Collector shall then draw up a statement as above provided in accordance with such decision.

When District Court may issue notices and hold inquiry.

222C. The Collector may, instead of himself issuing the notices and holding the enquiry required by sections 322A and 322B, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by sections 322A and 322B, and transmit such statement to the Collector.

Effect of decision of Court as to dispute arising under section 322B or 322C.

322D. The decision by the Court of any dispute arising under section 322B or section 322C shall, as between the parties thereto, have the force of, and be appealable, as, a decree.

This section applies to H. C.

An appeal under this section is a miscellaneous appeal, and is not from a decree passed in a regular suit—*Srinivas Ayyangar* vs. *Perew Tambi Nayankar*, I. L. R., 4 Mad., 420.

Scheme for liquidation of money-decrees.

323. Whenever the amount to be recovered and the property available have been determined as provided in section 322B or 322C, the Collector may—

(1) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale,

(2) raise such amount and interest (notwithstanding any order under section 304),

(*a*) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or

(*b*) by mortgaging the whole or any part of such property; or

(*c*) by selling part of such property; or

(*d*) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(*e*) partly by one of such modes, and partly by another or others of such modes.

(3) For the purpose of managing under this section the whole or any part of such property, the Collector may exercise all the powers of its owner.

(4) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable, or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this paragraph, he may

institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

In proceeding under paragraphs (2), (3) and (4) of this section, the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Chief Controlling Revenue-authority.

This section applies to H. C.

Recovery of balance, if any, after letting or management.

324. If, on the expiration of the letting or management under section 323, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks of the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

Collector to render accounts to civil Court.

324A. The Collector shall, from time to time, render to the Court which made the original order under section 304 an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this chapter, and shall hold the balance at the disposal of the Court.

Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and (if the Collector so directs) the expenses of witnesses summoned by him.

Application of balance.

Such balance shall be applied by the Court as follows:—

firstly, in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

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secondly, where the Collector has proceeded under section 321, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property or otherwise as the Court may under section 295 direct; or

thirdly, where the Collector has proceeded under section 322, in keeping down the interest on incumbrances on the property, and (when the judgment-debtor has no other sufficient means of subsistence) in providing for his subsistence to such amount as the Court thinks fit; and in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered;

and no other holder of a decree for money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied;

and the residue, if any, shall be paid to the judgment-debtor or such other person, if any, as the Court directs.

This section applies to H. C.

Sales how to be conducted.

325. When the Collector sells any property under this chapter, he shall put it up to public auction, in one or more lots as he thinks fit, and may—

(*a*) fix a reasonable reserved price for each lot;

(*b*) adjourn the sale for a reasonable time, whenever he deems the adjournment necessary for the purpose of obtaining a fair price for the property, recording his reasons for such adjournment;

(*c*) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

Restrictions as to alienation by judgment-debtor or his representative, and prosecution of remedies by decree-holders.

325A. So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by sections 322 to 325 (both inclusive), the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written

permission of the Collector, nor shall any civil Court issue any process against such property or part in execution of a decree for money.

During the same period no civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under section 323.

The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this section in respect of any remedy of which the decree-holder has thereby been temporarily deprived.

Provision where property is in several districts.

325B. When the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by sections 321 to 325 (both inclusive) shall, from time to time, be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

Powers of Collector to compel attendance of parties and witnesses and production of documents.

325C. In exercising the powers conferred on him by sections 322 to 325 (both inclusive), the Collector shall have the powers of a civil Court to compel the attendance of parties and witnesses and the production of documents.

This section applies to H. C.

When Court may authorise Collector to stay public sale of land.

326. When, in any local area in which no declaration under section 320 is in force, the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree may be made within a reasonable period by a temporary alienation or management of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him, instead of proceeding to a sale of the land or share. In such case the provisions of sections 320, paragraph two, to 325C (both inclusive) shall apply, as far as they are applicable.

This section applies to H. C.

This section does not apply to a decree which directs the sale of land or a share in land in persuance of a contract specifically directing it—*Bhagwan Prasad* vs. *Sheo Sahai*, I. L. R., 2 Alla., 856.

The only indulgence a Court can grant under this section is to allow the judgment-debtor a reasonable time to satisfy the decree by temporary alienation or management of his share: it does not authorize a Court to allow payment by instalments not in the decree—*Sheo Pershad* vs. *Shiva Ram*, 2 Alla., 59; and the debtor to retain possession of his land, either for self or as guardian of her minor son—*Kashee Lall* vs. *Mussamut Ameer Jan*, 2 Alla., 347; and where a Collector considered that the lands of a judgment-debtor should be exempted from auction and the judgment-debtor should be allowed to pay by instalments extending over 12 years it was held that the arrangement could not be supported—*Muttra Pershad* vs. *Ram Pershad*, 6 Alla., 39.

Local rules as to sales of land in execution of decrees for money.

327. The Local Government may, from time to time, with the sanction of the Governor-General in Council, make special rules for any local area imposing conditions in respect of sale of any class of interests in land in execution of decrees for money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value:

and if, when this Code comes into operation in any local area, any special rules as to sale of land in execution of decrees are in force therein, the Local Government may continue such rules in force, or may, from time to time, with the sanction of the Governor-General in Council, modify the same.

All rules so made or continued, and all such modifications of the same, shall be published in the local official Gazette, and shall thereupon have the force of law.

This section applies to H. C.

H.—Of Resistance to Execution.

Procedure in case of obstruction to execution of decree.

328. If, in the execution of a decree for the possession of property, the officer charged with the execution of the warrant is resisted or obstructed by any person, the decree-holder may complain to the Court at any time within one month from the time of such resistance or obstruction.

The Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same.

This section applies to H. C. and M. S. C. C.

This section applies to applications made by the decree-holder—*Bibee Mahtab Koomaree*, Petitioner, 19 W. R., 62, within one calendar month, excluding the date on which the resistance took place—*Dadu* vs. *Balgouda*, 5 Bom., 39. It is not imperative, and the omission to take action under it does not preclude a decree-holder from bringing a fresh suit to recover possession if he is ousted after his formal institution in possession—*Jugmohun Tewaree* vs. *Baldeo Naick*, 3 Agra, 162; or against any party obstructing him—*Soonder Lall and Dorga Dass* vs. *Mussamut Zaenub Begum*, S. D., N. W., 1863, p. 292.

In the case of *Hunkur Singh* vs. *Madho Lall*, 21 W. R., 147, Phear, J., held in effect that the limitation of one month in Act VIII, section 226, was only import-

ant as the limit prescribed within which the judgment-creditor might by virtue of section 228 bring an action of ejectment against a stranger; and that the judgment-creditor might ask the Court to proceed against the debtor in any matter connected with execution, within the ordinary period allowed. It is difficult to interpret section 329 to mean this.

Time of such resistance or obstruction.—That is the resistance or obstruction mentioned as forming the subject-matter of the complaint—*Ramasekara Pillai* vs. *Dharmarya Goundan*, I. L. R., 5 Mad., 113. The Limitation Act says thirty days—Limitation Act of 1877, Sch. II., cl. 167.

Procedure in case of obstruction by judgment-debtor or at his instigation.

329. If the Court is satisfied that the obstruction or resistance was occasioned by the judgment-debtor or by some person at his instigation, the Court shall inquire into the matter of the complaint, and pass such order as it thinks fit.

This section applies to H. C. and M. S. C. C.

Every obstruction must be caused either by the judgment-debtor, or at his instigation, or by third parties. This section deals with the two first cases—*Govinda Nair* vs. *Kesava*, I. L. R., 3 Mad., 81. Thus, if the decree-holder claims certain lands as having passed under the decree, and the debtor asserts that they were not included in it (and this would be necessary for a valid defence—*Prannath Roy Chowdhry* vs. *Preonath Roy Chowdhry*, 8 W. R., 398), the Judge should fix a day, hear the evidence adduced on each side, and decide the case—*Shadhoo Suran* vs. *Bhuggoo Lall*, 12 W. R., 98; and if he directs that the property shall be delivered in whole or in part, he should order that possession be given in one or other of the ways described in the Code.—*Brojomohun Sutputty* vs. *Shooda Monee Dabee*, 8 W. R., 79.

Procedure when obstruction continues.

330. If the Court is satisfied that the resistance or obstruction was without any just cause, and that the complainant is still resisted or obstructed in obtaining possession of the property by the judgment-debtor or some other person at his instigation, the Court may, at the instance of the decree-holder and without prejudice to any penalty to which such judgment-debtor or other person may be liable, under the Indian Penal Code or any other law, for such resistance or obstruction, commit the judgment-debtor or such other person to jail for a term which may extend to thirty days, and direct that the decree-holder be put into possession of the property.

This section applies to H. C. and M. S. C. C.

Procedure in case of obstruction by claimant in good faith, other than judgment-debtor.

331. If the resistance or obstruction has been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the claim shall be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant;

and the Court shall, without prejudice to any proceedings to which the claimant may be liable under the Indian Penal Code or any other law for the punishment of such resistance

or obstruction, proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V,

and shall pass such order as it thinks fit for executing or staying execution of the decree.

Every such order shall have the same force as a decree, and shall be subject to the same conditions as to appeal or otherwise.

This section applies to H. C. and M. S. C. C.

If the decree-holder has been obstructed—*Buhal Sing Chowdhry* vs. *Beharee Lall*, 10 W. R., 318, by any person not claiming on behalf of the judgment-debtor and has been unable to obtain possession, he can apply under this section—*Gunesh Pershad* vs. *Joykishun*, 1 Alla., 218; and then the title of the decree-holder will be tried under the procedure adopted in a suit for title—*Chinnasamo Pillai* vs. *Krishna Pillai*, I. L. R., 3 Mad., 104.

The Allahabad High Court has decided that when a third party prefers as an objection in obstruction to the execution of a decree, and before it has been completely executed, that he is in possession of the property, the Court, instead of striking the petition for execution off the file, should take up the case under this section—*Ram Tuhel Rai* vs. *Runnoo Pandey*, S. D., N. W., 1862, p. 35; see, however, *Bibee Mahtab Koomaree*, Petitioner, 19 W. R., 62; but it is clear that such an application does not fall within this section, which is limited to applications made by the decree-holder—*Buhal Singh Chowdhry* vs. *Behari Lal*, 1 B. L. R., 206.

A, having purchased certain lands as lakheraj from B, who refused to register the deed of purchase or give up possession, brought a suit for possession and obtained a decree. Meantime B surrendered the land as *mal* land to the zemindar who obstructed A in execution. It was held that A was entitled to possession, leaving the zemindar to bring a suit for resumption—*Taleb Hossein Khan* vs. *Gooroo Pershad Roy*, 20 W. R., 57.

Procedure in case of person dispossessed of property, disputing right of decree-holder to be put into possession.

332. If any person other than the judgment-debtor is dispossessed of any property in execution of a decree, and such person disputes the right of the decree-holder to dispossess him of such property under the decree, on the ground that the property was *bonâ fide* in his possession on his own account or on account of some person other than the judgment-debtor, and that it was not comprised in the decree, or that, if it was comprised in the decree, he was not a party to the suit in which the decree was passed, he may apply to the Court.

If, after examining the applicant it appears to the Court that there is probable cause for making the application, the Court shall proceed to investigate the matter in dispute; and if it finds that the ground mentioned in the first paragraph of this section exists, it shall make an order that the applicant recover possession of the property, and if it does not find as aforesaid, it shall dismiss the application.

In hearing applications under this section, the Court shall confine itself to the grounds of dispute above specified.

The party against whom an order is passed under this section may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be final.

This section applies to H. C. and M. S. C. C.

Party to the suit.—The term includes formal parties—*Juggessur Mookerjee*, Petitioner, 1st October 1860; but not a person who though a party to the original suit was not a party as regards the land in dispute—*Kasheenath Doss* vs. *Bhouanee Dossee*, W. R., Mis., 1864, p. 18. See "EFFECT OF A DECREE" under section 206, *ante*.

If in execution of decree a claim made by a third party in possession is rejected, he can either bring a regular suit or wait till he is dispossessed under this section—*Fergusson* vs. *Nil Komul Lahiree*, 23 W. R., 270; and then he may take action under it or bring a regular suit within the ordinary period of limitation—*Toolun* vs. *Shah Shojaut Alum*, S. D., N. W., 1864, p. 409; *Kishen Soondur Talookdar* vs. *Fukeeroodeen Mahomed*, W. R., 1864, p. 61, or both. See note on section 333.

When an application has been filed under this section the Court should examine the applicant in order to determine whether the application should or should not be admitted—*Obhoy Churn Dey* vs. *Rajendra Coomer Ghose*, 16 W. R., 288; and if it appears that the applicant was a defendant, even though he may not have been so originally, but was made so in the course of trial—*Ram Gopal Chuckerbutty* vs. *Poorno Chunder Banerjee*, 12 W. R., 475; *Huree Kishore Roy* vs. *Kalee Kishore Sein*, 8 W. R., 114; or a purchaser from him after the decree—*Brojendur Roy Chowdhry* vs. *Jugurnath Roy*, 6 W. R., 147; or that he is still in possession—*Kalee Narain Singh* vs. *Protap Chunder Burooah*, 12 W. R., 231; *Ruttun Kooer* vs. *Syud Tussuduck Hossein*, 22 W. R., 103; the application should be rejected—*Goluck Narain Dutt* vs. *Bistoo Prea Dossee*, 1 W. R., 140; *Collector of Bograh* vs. *Kristo Indur Roy*, 11 W. R., 191; *Mookundee Misrain* vs. *Sheo Lochun Pattuck*, 21 W. R., 39. But if it should appear that the applicant was in manual possession or in possession as landlord—*Bhyrub Sircar* vs. *Sham Manjee*, 15 W. R., 70; *Banee Madhub Dutt* vs. *Nund Lall Mojoomdar*, 22 W. R., 123: or as mortgagee; or as mortgagor through a mortgagee in possession—*Asgur Ali* vs. *Asgur Ali*, 20 W. R., 373, and has been dispossessed under the decree or under color of it—*Judoo Kapalee* vs. *Issur Chunder Roy*, 17 W. R., 375; *Hassun Ali* vs. *Naib Ahmed*, 11 W. R., 146, the application should not be rejected. Nor should it be rejected on the ground that the applicant had not originally obtained possession in a strictly legal manner—*Obhoya Churn Dey* vs. *Rajendro Coomar Ghose*, 22 W. R., 406; but the application should be received, numbered, registered and dealt with as a possessory action where proof of possession is sufficient—*Shafiuddin* vs. *Lochan Singh*, I. L. R., 2 Alla., 94. If there are several applications each application should be tried separately so as to prevent this section from being made a means of disposing of disputes between several claimants—*Sharoda Moyee Chowdhrain* vs. *Nobin Chunder Chowdhry*, 11 W. R., 255. The onus is on the applicant—*Mahomed Ausur* vs. *Prokash Chunder Sha*, 8 W. R., 8; *Woodoy Tara Chowdrain* vs. *Khajah Abdool Gunee*, 12 W. R., 16. He should confine himself to proving possession and leave the decree-holder to prove his right to take possession—*Judoonath Singh* vs. *Kalee Pershad*, 14 W. R., 358; *Brindabun Chunder Roy* vs. *Tarachand Banerjee*, 20 W. R., 114; a decree-holder has no right to take possession under a decree which is barred by limitation—*Mohesh Chunder Banerjee* vs. *Chunder Monee Dabia*, 9 W. R., 486. It has been held under Act VIII, 1859, section 230, that a morgagee whose bond is registered is entitled to recover possession of the mortgaged land, of which he has been dispossessed under a decree obtained against his mortgagor by another mortgagee whose bond has been subsequently registered, on condition that he satisfies the claim of the decree-holder. Otherwise the defendant is entitled to possession on his satisfying the plaintiff's mortgage claim—*Shiroji Bhikaji Kesheorad* vs. *Navji Patilthinge*, 2 Bom., 219; but a mortgagee cannot disposses a jotedar in execution proceedings—*Tarakant Banerjee* vs. *Puddomoney Dossee*, 10 Moore, 485. A mortgagee in possession, is in possession on his own account within this section—*Shafiruddin* vs. *Lochan Singh*, I. L. R., 2 Alla., 94.

This section applies to possessory actions—*Brohmo Moyee Dabee* vs. *Burkut Sirdar*, 13 W. R., 264; 12 W. R., 25. It was worthy of note that section 9, Act I, 1877, declares that no appeal shall lie from any order or decree passed in any suit instituted under that section, nor shall any review of any such order or decree be allowed.

Limitation.—The application should be filed within 30 days—Act XV, 1877, Sch. II, Art. 165.

It has been held that a Court could not extend the period allowed, even though the Court had been closed, and the application could not have been filed—*Dewan Ali* vs. *Munoor Ali*, 11 W. R., 259; but this decision will not now apply—section 5, Act XV, 1877.

If, while a case under this section is pending, the Court is deprived of jurisdiction, through the land which is the subject matter of the suit being transferred to another district, the case should not be dismissed, but the record ought to be transferred to the other district—*Kalee Doss Neogy* vs. *Huronath Roy Chowdhry*, 3 W. R., 5. This decision is doubtful: it seems better the applicant should proceed anew and claim the benefit of section 14, Act XV, 1877.

Withdrawal.—A claim made under section 230, Act VIII, 1859, was registered but withdrawn with the permission of the Court to bring a fresh suit. *Held*, that the plaintiff was entitled to bring a fresh suit within the general rules of limitation —*Subbaramien* vs. *Ponnusawmy Chetty*, 5 Mad., 298.

Transfer of property by judgment-debtor after institution of suit.

333. Nothing in section 331 or 332 applies to a person to whom the judgment-debtor has tranferred the property after the institution of the suit in which the decree is made.

This section applies to H. C. and M. S. C. C., so far as it relates to moveable property.

No appeal apparently lay from an order refusing an application under Act VIII of 1859, section 220 (corresponding to section 332), and the applicant's remedy was an ordinary suit; but if the application had been admitted, an appeal lay from the final decision—*Strinarasimma Chariyar* vs. *V. Narasimma Chariyar*, 5 Mad., 183; *Mokundee Misrain* vs. *Sheo Lochun Pattuck*, 21 W. R., 39; even though the procedure followed might have been irregular, such as that the application was not registered and numbered—*Id.*; *Musabhi* vs. *Shaunuddin Hismudden*, 4 Bom., 35; *Sabir Khan* vs. *Ram Luckee Chowdhrain*, 10 W. R,. 438.

Resisting or obstructing purchaser in obtaining possession of immoveable property.

334. If the purchaser of any immoveable property sold in execution of a decree be resisted or obstructed by the judgment-debtor or any one on his behalf in obtaining possession of the property, the provisions of this chapter relating to resistance or obstruction to a decree-holder in obtaining possession of the property adjudged to him shall be applicable.

This section applies to H. C.

This section is solely for the benefit of a purchaser at a sale in execution, and only applies to cases in which he has been resisted or obstructed in taking possession by the judgment-debtor or somebody on his behalf—*Onookool Chunder Mookerjee* vs. *Rajah Buroda Kant Roy*, 13 W R., 467.

The application must be made within 30 days from the date of the resistance—Art. 167, Act XV, 1877.

Obstructions by claimant other than judgment debtor.

335. If the purchaser of any such property is resisted or obstructed by any person other than the judgment-debtor claiming in good faith a right to the present possession thereof, or if,

in delivering possession thereof, any such person is dispossessed, the Court, on the complaint of the purchaser or the person so dispossessed, shall inquire into the matter of the resistance, obstruction or dispossession, as the case may be, and pass such order thereon as it thinks fit.

The party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be final.

This section applies to H. C.

The object of this section seems to be that there should be a power in the Court to prevent anything which would be an offence against the public peace taking place; and where there is an obstruction or resistance on an attempt being made to obtain possession—*Sharoda Pershad Mullick* vs. *Roy Dhunput Singh*, 19 W. R., 219, the Court in order to prevent future litigation should enquire into the relative *rights* of the parties—*Fidaye Shikdar* vs. *Ozeeoddeen*, 7 W. R., 87; *Huro Pershad Roy Chowdhry*, Petitioner, 24 W. R., 461, and pass such an order as may be proper in the circumstances of the case. It is not bound to pass any particular order—In the matter of *Zuhooran Begum*, 18 W. R., 87. The losing party may sue to establish his right to or to the present possession of the property within one year from the date of the order—Art. 11, Sch. II, Act XV, 1877; *Protab Chunder Chowdhry* vs. *Brojolall Shaha*, Ben., F. B. R., 638; and the plaintiff is entitled to take advantage of section 5 of the same Act, so that the decision in the case of *Kudomessuree Dassee* vs. *Enam Ali Mooktear*, 20 W. R., 167, declaring that no deduction should be allowed from the period of limitation because the Courts were closed, supposing it to have been good law, cannot be considered in force now. It will be noticed that the wording of the article in the Limitation Act referred to above is wider than that of this section which restrains the suit to a suit to establish a right to present possession; and if the latter is followed it would seem that where there is a subsisting right, which is contravened by the summary order, as if it declared a mortgage void and possession is obtained under it, such right continues to subsist for 12 months so as to ground a suit for possession by the person dispossessed, failing which he cannot sue afterwards on any portion of such right; but that in other cases where his right is consistent with the order and the possession, he is not forced to bring an action until some present relief becomes legally claimable—*Rangoo Vithal* vs. *Rikhivadas*, 11 Bom., 174.

The amendment to this section gets rid of the difficulty referred to in the case of—*Shaikh Harasatollah* vs *Brojo Nath Ghose*, 1 C. L. R., 517; I. L. R., 3 Cal., 729. It does not apply to the case of a person who has got possession, but cannot collect his rent afterwards—*Mussamut Zuhoorun Begum* vs. *Syud Mahomed Wajed*, 18 W. R., 87.

The party dispossessed may also bring a regular suit within the ordinary period of limitation—*Protap Chunder Chowdhry* vs. *Brojololl Shaha*, Ben., F. B. R., 638; a purchaser who has been obstructed may claim his right under this section and also bring a regular suit—*Madaree* vs. *Bulloo Kooeree*, 2 Alla., 450.

A purchaser at a court's sale ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one co-parcener only—*Kallapa* vs. *Venkatesh Vinayak*, I. L. R., 2 Bom., 676.

Against whom an order has been passed.—This section contemplates an order against one party or the other, and if the application is withdrawn an order allowing the withdrawal is not an order under this section—*Bhika* vs. *Sakar Lal*, I. L. R., 5 Bom., 440.

I.—Of Arrest and Imprisonment.

Place of judgment-debtor's imprisonment.

336. A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be

brought before the Court, and his imprisonment may be in the civil jail of the district in which the Court ordering the imprisonment is situate, or, when such jail does not afford suitable accomodation, in any other place which the Local Government may appoint for the confinement of persons ordered by the Courts of such district to be imprisoned:

Provided as follows:—

(*a*) for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset or before sunrise, and no outer door of a dwelling-house shall be broken open. But, when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may unfasten and open the door of any room in which he has reason to believe the judgment-debtor is to be found: provided that, if the room be in the actual occupancy of a woman who is not the judgment-debtor, and who according to the customs of the country does not appear in public, the officer shall give notice to her that she is at liberty to withdraw; and, after allowing a reasonable time for her to withdraw and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of making the arrest:

Proviso.

(*b*) when the decree in execution of which a judgment-debtor is arrested is a decree for money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

The Local Government may, by notification published in the official Gazette, direct that, whenever a judgment-debtor is arrested in execution of a decree for money and brought before the Court under this section, the Court shall inform him that he may apply under Chapter XX to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of his application and if he places all his property in possession of a receiver appointed by the Court.

If after such publication the judgment-debtor express his intention so to apply, and if he furnish sufficient security that he will appear when called upon, and that he will within one month apply under section 344 to be declared an insolvent, the Court shall release him from arrest:

A Small Cause Court debtor can apply to become an insolvent—*Syed Moidin* vs. *Sandaramurthia*, I. L. R., 2 Mad., 9.

But if he fails so to apply, the Court may either direct the security to be realised or commit him to jail in execution of the decree.

In the case of a surety such security may be realised in manner provided by section 253.

This section applies to H. C. and M. S. C. C.

Persons exempt from personal appearance in Court under sections 640, 641, whether male or female, are liable to arrest in execution (section 640)—*Maharani of Burdwan* vs. *Srimati Barada Sundari Debi*, 1 Ben., F. B. R., 31. An arrest under civil process of a Mofussil Court on Sunday is legal—4 Mad., lxii.

By section 180 of the Criminal Procedure Code, the Police Officer or other person authorized by warrant to arrest a person may break open any outer door or inner door, or window of any house or place, whether that of the person accused, or any other person, in order to execute such warrant if, after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance. There is no corresponding section in this Code, and it seems as if the officer in charge of the warrant could not in any case break open an outer door or a window, in order to make an arrest, but if he is able to enter the dwelling house. he may break out any room including the zenana in order to affect the arrest—*Kadumbinee Dossee* vs. *Koylash Kuminee*, I. L. R., 7 Cal., 19.

If a person when without jurisdiction is illegally brought within it and arrested, the arrest is illegal and this extends to all detainers in the Sheriff's hands at the time—*The Queen* vs. *Shearwood*, 2 Tay. and Bell, 71.

As to liability for negligence of the officer arresting the judgment-debtor, see *Kasturchand* vs. *Ravji Sadashiv*, I. L. R., 4 Bom., 65; or for not taking a proper surety —*Nago Mahadeo Apte Vakil* vs. *Narayan Ramchandra Patwardhan*, I. L. R., 4 Bom., 465. As to when damages may be recovered for arrest in accordance with a decree, see *Raj Chunder Roy* vs. *Shama Soonduree Debi*, I. L. R., 4 Cal., 583.

Warrant for arrest to direct judgment-debtor to be brought up.

337. Every warrant for the arrest of the judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs, if any, to which he is liable, be sooner paid.

This section applies to H. C. and M. S. C. C.

For form of warrant, see Sch. IV, No. 154, *post*. The executing officer is only empowered to arrest the defendant and detain him for such a reasonable time as is sufficient to allow of his being brought before the Court, and having an opportunity of applying for his discharge: the detention of a defendant after such reasonable time and without further authority of law is illegal—In re *Sambhoo Chunder Haldar*, Bourke, 59.

Scales of subsistence-allowances.

338. The Local Government may, from time to time, prescribe scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

This section applies to H. C. and M. S. C. C.

Judgment-debtor's subsistence-money.

339. No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as, hav-

ing regard to the scales so fixed, the Judge thinks sufficient for the subsistence of the judgment-debtor from his arrest until he can be brought before the Court.

When a judgment-debtor is committed to jail in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the said scales, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

The monthly allowance fixed by the Court shall be supplied by the party on whose application the decree has been executed, by monthly payments in advance before the first day of each month.

The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to jail, and the subsequent payments (if any) shall be made to the officer in charge of the jail.

This section applies to H. C. and M. S. C. C.

The first paragraph of this section is new, the remainder runs somewhat similar to section 276, Act VIII, with the exception that the words "or of the jail where the defendant may be in custody" have been struck out, and the minimum rate of four annas a day has been omitted, so as to avoid the points raised in *Aga Ali Khan* vs. *Joydoyal Pershad*, Bourke, 52; *F. L. Khan Spyer* vs. *Johan Janssen*, Bourke, 2. The payment of subsistence money must be in advance—In re *Konoy Lall Doss*, Bourke, 51; otherwise the arrest or commitment is illegal, and it is for the officer of the Court and not the prisoner to see that the money is paid—In the matter of *Julius Thomson*, Bourke, 421.

On the 30th of September the creditor paid subsistence money for 30 days, and the jailor had then a balance of four annas over from the subsistence money for September. *Held*, a sufficient compliance with the terms of this section, as the amount paid was sufficient for the whole of October—*Haladhar Dey* vs. *Ambika Charn Bose*, 5 B. L. R., App., 80; but where a prisoner was arrested on the 4th of August, and committed to prison on the evening of the same day, and only 27 days' subsistence money was paid in, it was held that the provisions of this section had not been complied with, although a sum making the amount sufficient for 28 days, was deposited next day—*Dutt* vs. *Cornelis*, 5 B. L, R., App., 79.

Under the present section an order for subsistence allowance appears to be necessary—See *Aga Ali Khan* vs. *Joydoyal Pershad*, Bourke, 52; In re *Sambhoo Chunder Haldar*, Bourke, 59. Every judicial officer under whose orders any civil prisoner is detained in jail shall, if the prescribed instalment of monthly allowance has not been deposited on the last day of the month, forthwith transmit an order to the officer in charge of the jail for such prisoner's release—Cal. Civ. O., No. 2, 1878.

Subsistence-money to be costs in suit.

340. Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in jail shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in jail or arrested on account of any sum so disbursed.

This section applies to H. C. and M. S. C. C.

Release of judgment-debtor.

341. The judgment-debtor shall be discharged from jail,

(*a*) on the amount mentioned in the warrant of committal being paid to the officer in charge of the jail; or

(*b*) on the decree being otherwise fully satisfied; or

(*c*) at the request of the person on whose application he has been imprisoned; or

(*d*) on such person omitting to pay the allowance as hereinbefore directed; or

(*e*) if the judgment-debtor be declared an insolvent, as hereinafter provided; or

(*f*) when the term of his imprisonment, as limited by section 342, is fulfilled:

Provided that, in the second, third and fifth cases mentioned in this section, the judgment-debtor shall not be discharged without the order of the Court.

A judgment-debtor discharged under this section is not thereby discharged from his debt; but he cannot be re-arrested under the decree in execution of which he was imprisoned.

In the matter of *Dwarkalall Mitter*, 1 Bourke, 109. This section applies to H. C. and M. S. C. C.

(*c*) See *Appiah Chetty* vs. *Chengadoo*, 4 Mad., 76.

The Code preserves a distinction between arrest and confinement in jail, and immunity from further process is only obtained by actual confinement—*E. Chengalraya Chetti* vs. *Subbiah*, 6 Mad., 84; in the matter of *Dwarkalall Mitter*, Bourke, 109; but it is not within the power of a Judge to re-arrest a defendant without any petition or motion on behalf of the judgment-creditors to that effect—*Shib Ram Mundul* vs. *Ruhumutoollah*, 15 W. R., 68. Under the old law, too, a former arrest was no bar to the imprisonment of the debtors—*Bimla Debea*, Petitioner, S. D., 1842, March 21; and when A having arrested B in execution represented that B did not wish to send him to jail; and desired to give him a specified time to adjust the debt, but the Judge ordered B to jail, where he was immediately released because diet money had not been paid, it was held that this imprisonment being irregular and against the will of the decree-holder did not protect B from further arrest in execution—*Salt Agent of Chittagong*, Petitioner, *S. D. Sum Decis*, January 16, 1843.

The judgment-debtor was arrested in execution of decree and committed to prison. He entered into a compromise with the decree-holder for the adjustment of the decree, and thereupon the decree-holder, without certifying the terms of such adjustment to the Court, petitioned for the discharge of the debtor who was accordingly released. Subsequently the decree-holder again applied for execution of his decree. He was met by the objection that an adjustment had taken place. The matter was not made the subject of enquiry, because it was a proceeding taken out of Court. The High Court, however, held that the decree-holder was bound to state why he applied to have the debtor discharged, and that if no adequate reason were shewn that he must be taken to have had his decree satisfied. The case was accordingly remanded to give the decree-holder an opportunity of stating this—*Chango* valad *Dudha Mahajan*, 4 Bom., 121.

The property of the debtor remains liable to attachment and sale—*Janoki Singh Roy* vs. *Kaloo Mundul*, B. L. R., (F. B.) 888.

A Court will release a defendant when the jailor holds no warrant—In the matter of *Shah Sahib*, 1 Ind. Jur., N. S., 19; but not if the warrant is only informal—In re *Bholanath Maley*, Bourke, 96. As to the effect of a return, see in the matter of *Omirto Lal Dey*, I. L. R., 1 Cal., 78; in the matter of *Gunesh Chunder Debi*, 5 B. L. R., 410.

342. No person shall be imprisoned in execution of a decree for a longer period than six months;

Imprisonment not to exceed six months.

or for a longer period than six weeks if the decree be for the payment of a sum of money not exceeding fifty rupees.

When not to exceed six weeks.

This section applies to H. C. and M. S. C. C.

On the expiration of the period, the prisoner is entitled to his discharge whether the imprisonment has been continuous or only at intervals—*Khoda Buksh* vs. *Sheikh Shukroollah*, 5 Alla., 220. The imprisonment is not a satisfaction of the decree, and the debtor can be adjudicated an insolvent for it—In the matter of *Rughubhai Ram Chandra*, 6 Bom., 86; *Janoki Singh Roy* vs. *Kaloo Mundul*, B. L. R., (F. B.) 889.

This section does not apply to persons imprisoned under Act VIII, 1859. Their maximum imprisonment is two years—In the matter of the petition of *Ratansi Kalianji*, I. L. R., 2 Bom., 148.

This section and section 341, *ante*, do not apply to cases of imprisonment for contempt of Court—*Martin* vs. *Laurence*, I. L. R., 4 Cal., 655.

343. The officer entrusted with the execution of the warrant shall endorse thereupon the day on, and the manner in, which it was executed, and, if the latest day specified in the warrant for the return thereof has been exceeded, the reason of the delay, or if it was not executed, the reason why it was not executed, and shall return the warrant with such endorsement to the Court.

Endorsement on warrant.

If the endorsement is to the effect that such officer is unable to execute the warrant, the Court shall examine him on oath touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.

This section applies to H. C. and M. S. C. C.

The endorsement is not legal evidence—*Obhoy Chunder Dutt* vs. *Erskine & Co.*, 3 W. R., Mis., 11; *Shah Koondun Lall* vs. *Noor Ali*, 10 W. R., 3; but see *Makoondonath Bhadoory* vs. *Shib Chunder Bhadoory*, 19 W. R., 102.

CHAPTER XX.

OF INSOLVENT JUDGMENT-DEBTORS.

344. Any judgment-debtor arrested or imprisoned in execution of a decree for money, or against whose property an order of attachment has been made in execution of such a decree, may apply in writing to be declared an insolvent.

Power to apply for declaration of insolvency.

Any holder of a decree for money may apply in writing that the judgment-debtor may be declared an insolvent.

Every such application shall be made to the District Court within the local limits of whose jurisdiction the judgment-debtor resides or is in custody.

This section applies to H. C.

This section applies to those defendants only—In the matter of *Beenarusee Dutt*, Cor., 123; who have been arrested or imprisoned—*Smith* vs. *Boggs*, 5 B. L. R., App., 21; in re *Eduljee Rutonjee*, 10 B. L. R., App., 27, under a money decree, and who have not filed a petition of insolvency—*Kristó Lall Gossain* vs. *Joy Gopaul Bysack*, 21 W. R., 185, and have, themselves, petitioned the Court—*Khetamal* vs. *Chuni Lal*, I. L. R., 2 Alla., 173, 179. It does not apply to cases of insolvency, where the debtor's property has vested in the Official Assignee—*Kissorce Mohun Chatterjee* vs. *Kanny Lall Dutt*, 1 Ind. Jur., N. S., 247.

This chapter applies to Mofussil Small Cause Courts—*Lallu Ganesh* vs. *Ranchod Kahandas*, I. L. R., 2 Bom., 641; but not to a Collector acting under Act VII (B. C.) of 1868—In the matter of *Bodru Rohman*, 3 C. L. R., 508. The Deputy Commissioner of Akyab has power to entertain applications under this section—In the matter of *Abdool Hamed*, I. L. R., 4 Cal., 94.

A defendant who was brought up under arrest in execution of a decree before a Small Cause Court presented an application under section 273, Act VIII, 1859, that he has only landed property, and this he was willing to place at the disposal of the Court. It was held that the plaintiff should be called upon to shew cause why he should not proceed against that immoveable property as provided by Act XXIII of 1861, section 8; that the fact that it was necessary to proceed by means of the process of another Court made no material difference; and that though the strict terms of section 273 could not be applied with effect to a proceeding in a Court of Small Causes, they were applicable so as to give full effect to what was the purpose intended by the Legislature, *viz.*, that the property described in the application should appear to be disposable in execution of the decree—*J. C. Shaw* vs. *Subramier*, 5 Mad., 108.

Contents of application.

345. The application, when made by the judgment-debtor, shall set forth—

(*a*) the fact of his arrest or imprisonment, or that an order for the attachment of his property has been made, the Court by whose order he was arrested or imprisoned, or by which the order of attachment was made, and, where he has been arrested or imprisoned, the place in which he is in custody;

(*b*) the amount, kind and particulars of his property, and the value of any such property not consisting of money;

(*c*) the place or places in which such property is to be found;

[If the application for discharge does not state the place in which the property may be found it must be refused—*Watkins* vs. *Rajah Roheenee Bullub*, 10 B. L. R., App., 11.]

(*d*) his willingness to put it at the disposal of the Court;

(*e*) the amount and particulars of all pecuniary claims against him; and

(*f*) the names and residences of his creditors, so far as they are known to or can be ascertained by him.

The application, when made by the holder of a decree for money, shall set forth the date of the decree, the Court by which it was passed, the amount remaining due thereunder, and the place where the judgment-debtor resides or is in custody.

This section applies to H. C.

Subscription and verification of application.

346. The application shall be signed and verified by the applicant in manner hereinbefore prescribed for signing and verifying plaints.

This section applies to H. C.

Service of copy of application and notice.

347. The Court shall fix a day for hearing the application, and shall cause a copy thereof with a notice in writing of the time and place at which it will be heard, to be stuck up in court and served at the applicant's expense—

where the applicant is the judgment-debtor—on the holder of the decree in execution of which he was arrested or imprisoned or the order of attachment was made, or on the pleader of such decree-holder, and on the other creditors (if any) mentioned in the application:

where the applicant is the decree-holder—on the judgment-debtor or his pleader.

The Court may, if it thinks fit, publish at the applicant's expense the application in such official Gazettes and public newspapers as it thinks fit.

Where the applicant is the judgment-debtor, the Court may exempt him from any payments under this section if satisfied that he is unable to make them.

This section applies to H. C.

Power to serve other creditors.

348. The Court may also, if it thinks fit, cause a like copy and notice to be served on any other person alleging himself to be a creditor of the applicant and applying for leave to be heard on the application.

This section applies to H. C.

Powers of Court as to judgment-debtor under arrest.

349. Where the judgment-debtor is under arrest, the Court may, pending the hearing under section 350, order him to be immediately committed to jail, or leave him in the custody of the officer to whom the service of the warrant was entrusted, or release him on his furnishing sufficient security that he will appear when called upon.

This section applies to H. C.

Procedure at hearing.

350. On the day so fixed, or on any subsequent day to which the Court may adjourn the hearing, the Court shall examine the judgment-debtor, in the presence of the persons on whom such notice has been served or their pleaders, as to his then circumstances and as to his future means of payment, and shall hear the said decree-holder, the other creditors mentioned in the application and the other persons (if any) alleging themselves to be creditors, in opposition to the judgment-debtor's discharge; and may, if it thinks fit, grant time to the said decree-holder and other creditors or persons to adduce evidence showing that the judgment-debtor is not entitled to be declared an insolvent.

This section applies to H. C.

The judgment-creditor does not, by making a verified application, throw the onus upon the judgment-debtor of proving the existence of circumstances which shew that he is not entitled to be declared an insolvent. It is only after the Court is satisfied that the allegations made by the debtor in his petition and examination are true that the creditors should be called on to shew cause—*Gladstone, Wyllie & Co.* vs. *Woomesh Chunder Chatterjee*, 25 W. R., 95; *Abdool Sobhan* vs. *Abdool Ruhman*, 12 W. R., 125; *Seton* vs. *Bijohn*, 17 W. R., 165; 8 B. L. R., 255. As to the amount of evidence necessary in cases in which the creditor does not *produce* evidence, see *Syud Abdool Settar* vs. *Mussamut Mukhum Kooer*, 25 W. R., 182.

Where the prisoner is examined under this section, any fee, if demandable at all, is demandable from the creditor—*Edmond* vs. *Niersis*, 16 W. R., 84.

Declaration of insolvency and appointment of receiver.

351. If the Court is satisfied—

(*a*) that the statements in the application are substantially true;

(*b*) that the judgment-debtor has not, with intent to defraud his creditors, concealed, transferred or removed any part of his property since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned, or the order of attachment was made, or at any subsequent time;

(*c*) that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts or given an unfair preference to any of his creditors by any payment or disposition of his property;

(*d*) that he has not committed any other act of bad faith regarding the matter of the application,

the Court may declare him to be an insolvent, and may also, if it thinks fit, make an order appointing a receiver of his property, or if it does not appoint such receiver, may discharge the insolvent.

If the Court is not so satisfied, it shall make an order rejecting the application.

This section applies to H. C.

The burden of proof lies on the debtor. He must bring his case within the section—*Seton* vs. *Bijohn*, 17 W. R., 165 ; 8 B. L. R., 255 ; *Mumtaz Hossein* vs. *Brij Mohun Thakoor*, I. L. R., 4 Cal., 888 ; *Nubbi Buksh* vs. *Chasni*, I. L. R., 6 Cal., 168 ; *Baoachi Packi* vs. *Pierce Leslie*, I. L. R., 2 Mad., 219. A person seeking the assistance of the Court must make a full disclosure. If a *primâ facie* case is made out that the applicant has not fully disclosed his property, but has wilfully concealed it in part, he is bound, as having the best knowledge of the circumstances, to rebut that evidence on oath—*Gunga Churn Dhur* vs. *Kulinga Pa Setee*, 12 W. R., 422. If a debtor is found not to have entered in his list property in his possession, he cannot be discharged, but must be dealt with under section 359, *post*—*Gunga Gobind Mundul* vs. *Bonomalee Paul*, 14 W. R., 54.

The applicant should place his stipend or annuity at the disposal of the Court—*Nawab Asudut Dowla Reza Hossein Khan* vs *Haminsud Dowla Abed Khan*, 15 W. R., 204 ; though apparently he will not be refused his discharge solely for not doing so, if he is without present means of payment and has given every facility in his power to his creditors to obtain his existing property—*Coombe* vs *Caw*, 13 B.L.R., 268 ; *Chyet Ram* vs. *Ram Chunder Dutt*, Bourke, 101.

If the statements in the application are substantially true and the judgment debtor has not brought himself within clauses (*b*), (*c*) or (*d*) of this section the Court is bound to grant the application—*Salamat Ali* vs. *Minahan*, I. L. R., 4 Alla., 337.

Bad faith.—A repaired B's ship on the express representation that the repairs should be paid for by a letter of credit which the owners had sent for that purpose. B applied the funds to the payment of other creditors. A sued him and obtained a decree in execution of which B was imprisoned. It was held that B had been guilty of bad faith and of giving undue preference—*Passmore* vs. *Calcutta Docking Co.*, Bourke, 74 ; subsequently, bad faith, under section 275, Act VIII, 1859, was limited to bad faith in respect of the application, and not to acts committed in incurring the liability—*Butler* vs. *Lloyd*, 12 B. L. R., App., 12 ; and where the original debt has been converted into a judgment-debt, the Judge should not go behind the decree to see in what way the original debt had been incurred—*Salamat Ali* vs. *Minahan*, I. L. R., 4 Alla., 337. On the other hand it has been held that a Judge is under this section entitled to enter into all acts of bad faith towards creditors at the period at which the applicant was contemplating insolvency—*Bavachi Packi* vs. *Pierce Leslie*, I. L. R., 2 Mad., 219.

Discharge.—Where a judgment-debtor is declared to be discharged under this section, but the procedure prescribed in it has not been followed, the order must be treated as a nullity, and will not bar a subsequent application to arrest him—*Luchmee Narain* vs. *Bheerio Pershad*, 2 Agra, Mis., 4.

Appeal.—See *post*, section 588, cl. (17). The last paragraph is new. See—*Nubbi Buksh* vs. *Chasni*, I. L. R., 6 Cal., 168.

Creditors to prove their debts

352. The creditors mentioned in the application and the other persons (if any) alleging themselves to be creditors of the insolvent, shall then produce evidence of the amount and particulars of their respective pecuniary claims against him ; and the Court shall by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts ; and shall frame a schedule of such persons and debts ; and the declaration under section 351 shall be deemed to be a decree in favour of each of the said creditors for their said respective debts.

Schedule to be framed

A copy of every such schedule shall be stuck up in the court-house.

Nothing in this section shall be deemed to entitle a partner in an insolvent-firm or, when he has died before the insolvency, his legal representative, to prove in competition with the creditors of the firm.

This section is new. It applies to H. C

If a creditor examines the applicant the former must pay the costs of recording the evidence in the case—*Edmond* vs. *Nierse*, 16 W. R., 84.

Insolvent Firm—The general rule is that where there is a bankruptcy of a firm and also the bankruptcy of an individual member of the firm that the estate of the firm and the separate estate of the individual are kept distinct from each other, and a bankrupt firm cannot prove against the separate estate in competition with the creditors of that separate estate, nor can the creditors of a separate partner prove against the joint estate in competition with the creditors of that estate; but if an individual partner, fraudulently as to his partners, applies the partnership funds to his own use, the creditors of the firm are entitled to prove against the separate estate of the individual partner—*Read* vs. *Bailey*, 3 App., Cas., 94.

Applications by unscheduled creditors.

353. Any creditor of the insolvent who is not mentioned in such schedule may apply to the Court for permission to produce evidence of the amount and particulars of his pecuniary claims against the insolvent, and, in case the applicant proves himself to be a creditor of the insolvent, for an order directing his name to be inserted in the schedule as a creditor for the debt so proved.

Any creditor mentioned in the schedule may apply to the Court for an order altering the schedule so far as regards the amount, nature or particulars of his own debt, or to strike out the name of another creditor, or to alter the schedule so far as regards the amount, nature or particulars of the debt of another creditor.

In the case of any application under this section, the Court, after causing such notices as it thinks fit to be served, at the applicant's expense, on the insolvent and the other creditors, and hearing their objections, if any, may comply with or reject the application.

This section applies to H. C.

Act XV, 1877, Art. 174, declares that the period of limitation is ninety days.

Effect of order appointing Receiver.

354. Every order under section 351 shall be published in the local official Gazette and shall operate to vest in the Receiver all the insolvent's property (except the particulars specified in the first proviso to section 266), whether set forth in his application or not.

This section applies to H. C.

Receiver to give security and collect assets.

355. The Receiver so appointed shall give such security as the Court may direct and shall possess himself of all such property, except as aforesaid;

Discharge of insolvent.

and on his certifying that the insolvent has placed him in possession thereof, or has done everything in his power for that purpose, the Court may discharge the insolvent upon such conditions (if any) as the Court thinks fit.

This section applies to H. C.

356. The Receiver shall proceed under the direction of the Court—

Duty of Receiver.

(*a*) to convert the property into money:

(*b*) to pay thereout debts, fines and penalties (if any) due by the insolvent to Government:

(*c*) to pay the said decree-holder's costs:

(*d*) to discharge according to their respective priorities, all debts secured by mortgage of the insolvent's property:

(*e*) to distribute the balance among the scheduled creditors rateably according to the amounts of their respective debts and without any preference,

and such Receiver may retain as a remuneration for the performance of his duties a commission, to be fixed by the Court, not exceeding the rate of five per centum upon the amount of the balance so distributed (the amount of the commission so retained being deemed a distribution) and shall deliver the surplus, if any, to the insolvent or his legal representative:

His right to remuneration.

Delivery of surplus.

Provided that, in any local area in which a declaration has been made under section 320 and is in force, no sale of immoveable property paying revenue to Government or held or let for agricultural purposes shall be made by the Receiver; but, after he has sold the other property of the insolvent, the Court shall ascertain (*a*) the amount required to satisfy the claims of the scheduled creditors after deducting the moneys already received, (*b*) the immoveable property of the insolvent remaining unsold, and (*c*) the incumbrances, if any, existing thereon, and shall forward a statement to the Collector containing the particulars aforesaid; and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by sections 322 to 325 both inclusive, as he thinks fit, and subject to the provisions of those sections so far as they may be applicable; and shall hold at the disposal of the Court all sums that may come to his hands by such exercise.

This section applies to H. C.

357. An insolvent discharged under section 351 or 355 shall not be arrested or imprisoned on account of any of the scheduled debts. But

Effect of discharge.

(subject to the provisions of section 358) his property, whether previously or subsequently acquired (except the particulars specified in the first proviso to section 266 and except the property vested in the Receiver), shall, by order of the Court, be liable to attachment and sale until the debts due to the scheduled creditors are satisfied to the extent of one-third, or until the expiry of twelve years from the date of the order of discharge under section 351 or 355.

This section applies to H. C.

The insolvent is not liable to be arrested on account of the scheduled debts but his property may be attached and sold. See *Janoki Singh Roy* vs. *Kaloo Mundul*, Ben., F. B. R., 889. If the defendant has not been declared an insolvent, he cannot be discharged under this section, but under section 341.

Declaration that insolvent is discharged from liability.

358. If the aggregate amount of the scheduled debts is two hundred rupees or a less sum, the Court may, and in any case after the scheduled debts have been satisfied to the extent of one-third, or after the expiry of twelve years from the order of discharge, the Court shall, declare the insolvent discharged as aforesaid absolved from further liability in respect of such debts.

This section applies to H. C.

Procedure in case of dishonest applicant.

359. Whenever, at the hearing under section 350, it is proved that the applicant has

(*a*) been guilty, in his application, of any concealment or of wilfully making any false statement as to the debts due by him, or respecting the property belonging to him, whether in possession or in expectancy, or held for him in trust;

(*b*) fraudulently concealed, transferred or removed any property; or

(*c*) committed any other act of bad faith regarding the matter of the application,

the Court shall, at the instance of any of his creditors, sentence him by order in writing to imprisonment for a term which may extend to one year from the date of committal.

Or the Court may, if it think fit, send him to the Magistrate to be dealt with according to law.

This section applies to H. C.

(*c*). *Bad faith.* See note on section 351, *ante*.

360. The Local Government may, by notification in the official Gazette, invest any Court other than a District Court with the powers conferred on District Courts by sections 344 to 359 (both inclusive), and the District Judge may transfer to any Court situate in his district and so invested any case instituted under section 344.

Investment of other Courts with powers of District Courts.
Transfer of cases.

Any Court so invested may entertain any application under section 344 by any person arrested in execution of a decree of such Court.

Nothing in this chapter shall apply to any Court having jurisdiction in the towns of Rangoon, Maulmain, Akyab and Bassein where the property of the judgment-debtor exceeds in value two thousand five hundred rupees, or the amount of the pecuniary claims against him exceeds five thousand rupees, or such property or any part thereof is situate outside British Burma.

This section applies to H. C.

PART II.

OF INCIDENTAL PROCEEDINGS.

CHAPTER XXI.

OF THE DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

361. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

No abatement by party's death, if right to sue survives.

Illustrations.

(*a*) A covenants with B and C to pay an annuity to B during C's life. B and C sue A to compel payment. B dies before the decree: the right to sue survives to C, and the suit does not abate.

Anderson vs. *Martindale*, 1 East., 497.

(*b*) In the same case, all the parties die before decree. The right to sue survives to the representative of the survivor of B and C, and he may continue the suit against A's representative.

(*c*) A sues B for libel. A dies. The right to sue does not survive, and the suit abates.

(*d*) A, a member of a Hindu joint family under the mitakshara law, institutes a suit for partition of the family-property. A dies leaving B, a minor son, his heir. The right to sue survives to B, and the suit does not abate.

This section applies to H. C. and M. S. C. C.

The cause of action means the right to bring the action—*Chandramohan Dutt* vs. *Biswambhar Laha*, 1 B. L. R., 42. By section 37, Act IX, 1872, "promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract," and in all such cases the cause of action will survive. By section 268, Act X, 1865, "all demands whatsoever, and all rights to prosecute or defend any action or special proceeding existing in favour of or against a

person at the time of his decease, survive to and against his executors or administrators except causes of action for defamation, assault as defined in the Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory. *Illustrations.* (*a*). A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without bringing any action. The cause of action does not survive. (*b*) A sues for a divorce. A dies. The cause of action does not survive to his representative."

A, as reversioner, sued a Hindu widow to set aside some illegal acts done by her. B intervened and claimed to be the next reversioner. The widow died during the suit. *Held*, the suit abated and the dispute between A and B must be decided in a new suit—*Ramjun* vs. *Mussamut Lachee*, 1 Agra, 49; but where one defendant ceased to have any interest in the suit before he died, it was held that it might proceed against the other defendants, without his representatives—*Moung Khine* vs. *Burn*, 6. W. R., Ref., 2.

A suit for possession of land and mesne profits does not abate because the land has been washed away—*Unno Poorna Debia* vs. *Ram Lochun Ghose*, 5 W. R., 227; or the defendant has died—*Noboo Coomar Ghose* vs. *Raja Indrodeb*, W. R., Mis., 1864, p. 1

The Judicature Rules (order 50, rule 1) declare that "an action shall not become abated by reason of the marriage, death or bankruptcy of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*;" and it has been held that the words "survive or continue" mean "survive or continue" in some person who is before the Court; and where a sole plaintiff in an action filed a liquidation petition under which a trustee was appointed and the trustee did not appear the action was struck out of the list of cases—*Eldridge* vs. *Burgess*, 7 Ch. D., 411; but where two trustees were appointed, and one elected to go on, making the other a defendant, the action was allowed to proceed—*Jackson* vs. *North Eastern Railway Company*, 5 Ch. D., 844; and where a sole petitioner died after an order made on the petition, the Court allowed the petition to be continued and carried on by the representatives of the petitioner—In re *Atkin's Trust*, 1 Ch. D., 82.

Procedure in case of death of one of several plaintiffs or defendants if right to sue survive.

352. If there be more plaintiffs or defendants than one, and any of them dies, and if the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

This section applies to H. C. and M. S. C. C.

The cause of action means "the right to bring the action." Where A and B sued as joint owners for damages on account of trespass and B died, the cause of action did not survive to A and the representatives of B, but only to B—*Chandramohun Dutt* vs. *Biswambhur Laha*, 1 B. L. R., 42.

In a suit for possession of timber, one of the defendants who, in pursuance of an agreement, had given possession of the timber to a co-defendant died. It was held that, as he had ceased to have any interest in the logs before his death, his representatives should not be made parties, and that the suit survived against the other defendants alone—*Moung Khine* vs. *Burn*, 6 W. R., 2.

Procedure in case of death of one of several plaintiffs where right to sue survives to survivors and representative of deceased.

363. If there be more plaintiffs than one, and any of them dies, and if the right to sue does not survive to the surviving plaintiff or plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the Court may, on the application of such legal representative, enter his name on the record in

the place of such deceased plaintiff, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs and such legal representative.

This section applies to H. C. and M. S. C. C.

This section does not apply to proceedings in execution of decree—*Golabdas* vs. *Lakhsman Narhar*, I. L. R., 3 Bom., 221; *Dulari* vs. *Mohan Singh*, I. L. R., 3 Alla., 759.

Procedure where no application made by representative of deceased plaintiff.

364. If within the time limited by law no application be made to the Court by any person claiming to be the legal representative of a deceased plaintiff, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs;

and the legal representative (if any) of the deceased plaintiff shall be made a party and shall be interested in and bound by the decree passed in the suit, in the same manner as if the suit had proceeded at his instance conjointly with the surviving plaintiff or plaintiffs.

This section applies to H. C. and M. S. C. C.

Procedure in case of death of sole, or sole surviving, plaintiff.

365. In case of the death of a sole plaintiff or sole surviving plaintiff, the Court may, where the right to sue survives, on the application of the legal representative of the deceased, enter his name in the place of such plaintiff on the record, and the suit shall thereupon proceed.

This section applies to H. C. and M. S. C. C.

This section does not apply to a suit in which a decree has been made—*Cally Churn Mullick* vs. *Bhogobutty Churn*, 5 C. L. R., 108; nor to proceedings in execution of decree—*Golabdas* vs. *Laksman Narhar*, I. L. R., 3 Bom., 221; *Dulari* vs. *Mohan Singh*, I. L. R., 3 Alla., 759.

A sued B in consequence of certain malicious and wrongful conduct in the part of B and got a decree. B appealed, sold to C four annas of property liable to be attached in execution of A's decree, and died. *Held*, that C was not his representative to carry on the appeal, since C was in nowise concerned with the original cause of action, and the right of action did not relate to the property he had bought—*Macleod* vs. *Kunhoje Sahoo*, 9 W. R., 271.

A appealed, gave the property connected with the suit to B by deed of gift and died. B was allowed to carry on the appeal as heir against joint heirs; but not as donee—*Mussamut Luteefoonnissa Bibee* vs *Syud Rajaoor Rahman*, 8 W. R., 84.

If no application is made within sixty days, the suit will be considered as abated—Art. 171, Sch. II, Act XV, 1877; *Khetronath Dey* vs. *Gosseen Dass Dey*, 11 W. R., 543; but the Court may revive the suit under section 371, *post*—*Bhoyrub Dass Johurry* vs. *Doman Thakoor*, I. L. R., 5 Cal., 139.

An application under this section and section 587, *post*, to substitute the legal representative of an appellant is not passed by Art. 171 of the Limitation Act—In the matter of *Ram Sunker Bhadoory*, 3 C. L. R., 440; but see the amendment in section 582, *post*.

Abatement where no application by representative of deceased plaintiff.

366. If within the time limited by law no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that

the suit shall abate, and shall, on the application of the defendant, award to the defendant the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff;

or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes.

Explanation.—A certificate of heirship, or a certificate to collect debts, does not of itself constitute the person holding it the legal representative of the deceased. But when the person holding any such certificate obtains thereby property belonging to the deceased, he may be treated as a legal representative liable in respect of such property.

This section applies to H. C. and M. S. C. C.

This section does not apply to a suit in which a decree has been made—*Cally Churn Mullick* vs. *Bhuggobutty Churn*, 4 C. L. R., 108; nor to proceedings in execution of decree—*Dular* vs. *Mohun Singh*, I. L. R., 3 Alla., 759.

A certificate to collect debts under Act XXVII, 1860, does not enable the holder to recover property from a person wrongfully in possession—*Awkinnfee* vs. *Mee Nay*, 8 W. R., 1. Neither does a certificate of heirship granted under Regulation VIII, 1827—*Shripat Ramchandra Kulkarni* vs. *Vilhoji*, 4 Bom., 178; but the holders may be treated as representatives in respect of the assets in their hands.

Where a special appellant died after the High Court had referred for trial to the Court below an issue based on objections taken by the respondent under section 348, Act VIII of 1859, it was held that the respondent could not insist that the appeal should proceed—*Jaita* bin *Kalu* vs. *Balu* bin *Raghu*, 3 Bom., 81.

An appeal was preferred by B as heir of A a party to the suit who had died subsequent to the decision of the lower Court, and time was given to enable B to prove that he was the legal representative. He did not do so for a long time. *Held* that the appeal must abate, that the course the appellant should have pursued was to apply to the Court for permission to carry on the appeal and then the Court would have passed an order to enable him to prove that he represented the deceased (section 367); but instead of doing that he appealed first and then delayed in proving his heirship—*Moharanee Kowari* vs. *Lochmun Pershad*, 2 Sev., 892.

Practice.—If application be not made within 60 days from the death of a sole plaintiff the suit abates; but under section 371, *post*, it may be revised on the application of the legal representative within three years from the time when the right to apply accrued—*Bhoyrab Doss Johurry* vs. *Doman Thakoor*, 4 C. L. R., 374.

Appeal.—No appeal lay from an order passed under the first paragraph of this section directing a suit to abate—*Ahmed Ata* vs. *Mata Badal Lal*, I. L. R., 3 Alla., 844.

Procedure in case of dispute as to representative of deceased plaintiff.

367. If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide

at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

This section applies to H. C. and M. S. C. C.

When a person claims to represent a deceased decree-holder, and to execute the decree, the application should not be summarily rejected, but the applicant should be called on to prove his right to represent the deceased—*Wooma Churn Mookerjee* vs. *Luckhee Narain Chowdhry*, 1 W. R., Mis., 10.

Quære.—If this section refers to applications in execution of decree—*Abeedunnissa Khatoon* vs. *Ameerunnissa*, L. R., 4 Ind. App., 66-75.

A Hindu widow sued to recover possession of her husband's estate and died. Two adverse claimants to the estate appeared and were made co-plaintiffs. It was held that, though the procedure was irregular the judgment should not be set aside on that ground, as the defendants had raised no objection at the time—*Mussamut Parbutty* vs. *Mussamut Higgin*, 17 W. R., 475.

If a party in order to prevent a suit abating treats a person as representative of the deceased and puts his name on the record, and the case is decided in their presence he cannot afterwards urge that the person on the record is not the legal representative—*Sheik Allah Hafiz* vs. *Lalun Bebee*, 2 Sev., 22.

Practice.—The application must be made to the Court trying the suit. Thus a District Judge has no power to act under this section where the cause is before a Subordinate Judge although the latter may not be in Court on the day of the application—*Biproo Chunder Joobraj* vs. *Ramlochun Deb*, W. R., 1864, p. 121.

As to the liability of the legal representative to pay costs, see *Boynton* vs. *Boynton*, 4 App. Cas., 733.

Procedure in case of death of one of several defendants,

683. If there be more defendants than one, and any of them die before decree, and the right to sue does not survive against the surviving defendant or defendants alone,

or of sole or sole surviving defendant.

and also in case of the death of a sole defendant, or sole surviving defendant, where the right to sue survives,

the plaintiff may make an application to the Court, specifying the name, description and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead.

The Court shall thereupon enter the name of such representative on the record in the place of such defendant,

and shall issue a summons to such representative to appear on a day to be therein mentioned to defend the suit;

and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the suit:

Provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative.

When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period.

This section applies to H. C. and M. S. C. C.

A suit having been dismissed, plaintiff appealed. Defendant died, and his death was notified to the Court; but plaintiff did not attempt to make the heirs of the deceased parties, and a decree was given against A's estate. *Held*, the decision must be set aside, and the procedure under this section followed—*Monee Lall* vs. *Kazee Fuzul Hossein*, 14 W. R., 337; and where the sole defendant in a suit dies before decree, a decree passed against him on the supposition that he is alive cannot be executed—*Roop Naraian Singh* vs. *Ramayee Singh*, 3 C. L. R., 192.

The case proceeds as if the representative had originally been made a defendant. Therefore, if plaintiff loses the action after application, he must pay full costs—*Benge* vs. *Swain*, 23 L. J., C. P., 182.

For the procedure in England in an administration suit against an executrix as sole defendant and she dies—*Cash* vs. *Parker* 12 Ch. Div., 293.

In case of the death of a respondent, a procedure analogous to that laid down in this section must be followed—*Laksmitbai* vs. *Balkrishna*, I. L. R., 4 Rom., 654; *Raj Moni Debi* vs. *Chandra Kant Sannyal*, 10 C. L. R., 437; section 582, *post*.

Suit not abated by marriage of female party.

693. The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may thereupon be executed against her alone.

If the case is one in which the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may with such permission be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

This section applies to H. C. and M. S. C. C.

The term judgment may not include judgment in appeal. Where a person died during the progress of a suit, his wife was brought on the record and judgment given against her, which was affirmed on appeal. Between the original and final judgment she married again. It was held that the decree could not be executed against the second husband—*Bindabun Chunder Sircar Chowdhry* vs. *Mackintosh*, 9 W. R., 442.

When plaintiff's bankruptcy or insolvency bars suit.

370. The bankruptcy or insolvency of a plaintiff in any suit which his assignee or the receiver appointed under section 351 might maintain for the benefit of his creditors shall

not bar the suit, unless such assignee or receiver declines to continue the suit and to give security for the costs thereof within such time as the Court may order.

Procedure when assignee fails to continue suit or give security.

If the assignee or receiver neglect or refuse to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's bankruptcy or insolvency, and the Court may dismiss the suit and award to the defendant the costs which he has incurred in defending the same, to be proved as a debt against the plaintiff's estate.

This section applies to H. C. and M. S. C. C.

This section only applies to actions pending when the bankruptcy or insolvency occurs—*Stanton* vs. *Collier*, 23 L. J., Q. B., 116. It does not declare that the assignee shall be made a party to the suit, as the Act does in the case of persons representing a party deceased. The practice in India has been to add or substitute the assignee's name, and he may be called on to deposit the costs of an appeal—In the matter of *Heeralall Seal*, 13 W. R., 431 ; *Ibrahim* vs. *Abdur Rahiman*, 12 Bom., 257.

Defendant cannot plead the abatement without giving the official assignee an opportunity of prosecuting the suit—*Ibrahim Bin Mahasin* vs. *Abdur Rohiman*, 12 Bom., 257.

Effect of abatement or dismissal.

371. When a suit abates or is dismissed under this chapter, no fresh suit shall be brought on the same cause of action.

This clause does not take away plaintiff's right to bring a new suit, after a former action had abated under section 102, Act VIII of 1859—*Pallikunath* vs. *Mullankaji*, I. L. R., 3 Mad., 31.

Application to set aside abatement or dismissal.

But the person claiming to be the legal representative of the deceased or bankrupt or insolvent plaintiff may apply for an order to set aside the order for abatement or dismissal ; and, if it be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

This section applies to H. C. and M. S. C. C.

This section only refers to cases in which the plaintiff has died, become a bankrupt, or insolvent. The judgment is generally set aside on payment of costs and depositing the amount of the decree—*Goddard* vs. *Poole*, W. N., 1875, p. 230.

When plaintiff dies testate and there is difficuty in obtaining probate of his will, mere neglect to apply for limited administration will not be a bar to obtaining an order under this section—*Bhoyrub Doss Johurry* vs. *Doman Thakoor*, 4 C. L. R., 374.

Procedure in case of assignment pending suit.

372. In other cases of assignment, creation or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties

or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed, as the case may require.

Judicature Acts, order 50, rule 3. This section applies to H. C. and M. S. C. C.

Pending the suit.—This section has been held to apply to the case of where one of the defendants died after decree in a suit for partition—*Sham Lal Mullick* vs. *Monemohinee Dossee*, 5 C. L. R., 109; and where in a suit respecting a will there was a decree that a scheme should be settled; but that decree was not proceeded with and no decree was settled, the suit was treated as pending—*Gocool Chunder Gossami* vs. *Administrator General of Bengal*, 5 C. L. B., 569; *Govind Chunder* vs. *Rukgunmoney*, I. L. R., 6 Cal., 60.

The Court may revive without consent or notice, when the parties who ought to give consent or get notice are dead—*Gocool Chunder Gossami* vs. *The Administrator General of Bengal*, 5 C. L. R., 569.

Looking at sections 232, 233, it would seem as if this section would not apply to execution of decrees assigned by the decree-holder. A Court is not bound to re-admit the assignee of a decree to execute it—*Bishtoo Churn Bhoosan* vs. *Kishen Gopal Misser*, 13 W. R., 207; but when a decree is sold and the sale is admitted, the judgment-debtor cannot contest the right of the purchaser to execute it—*(Id.)*; *Sunnobarnissa Khanum* vs. *Meherchund*, W. R., 1864, p. 313.

An assignee or purchaser of a decree takes it subject to the right of set-off—section 233, *ante*; *Opendro Mohun Moostafee* vs. *Poorno Chunder Bhuttacharjee*, 19 W. R., 85; *Kaim Ali Joardar* vs. *Luckhy Kant Chuckerbutty*, 10 W. R., F. B., 32.

A Hindu widow sold a portion of her interest in a suit to A, and died after decree: *Held*, A only bought her life interest, and could not execute the decree—*Gobind Narain Dey* vs. *Gour Monee Debia*, 17 W. R., 20.

As to the state of the law under Act VIII of 1859, see—*Morishwar Bapa Phatak* vs. *Kushaba Shankroji*, I. L. R., 2 Bom., 248.

CHAPTER XXII.

OF THE WITHDRAWAL AND ADJUSTMENT OF SUITS.

Power to allow plaintiff to withdraw with liberty to bring fresh suit.

373. If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff *(a)* that the suit must fail by reason of some formal defect, or *(b)* that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.

If the plaintiff withdraw from the suit, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh suit for the same matter or in respect of the same part.

Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of others.

This section applies to H. C. and M. S. C. C.

The words "at any time after the institution of the suit" would seem to imply that leave to withdraw can be given by any Court, original or appellate. In *Watson* vs. *The Collector of Zillah Rajshahye*, 13 Moore, 160, the Privy Council decided that there was no power in the Courts in India similar to that exercised by the Courts of Equity and Common Law in England to dismiss a suit with liberty to bring a fresh suit for the same matter or to enter a non-suit. Their power was limited to questions of form: (1) of misjoinder of parties or of matters in suit; (2) where a material document had been rejected for not having a proper stamp; and (3) where there had been an improper valuation of the subject-matter of the suit, but not to cases where issue had been joined, and the plaintiff failed to produce evidence in support of the issues. This decision referred to the procedure in force in 1857, and not to Act VIII of 1859, but the distinction was lost sight of, and the decision was applied to the Procedure Code—See the case of *Muddun Ram Doss* vs. *Israil Ali*, 21 W. R., 291. The Court at Allahabad had previously arrived at the same conclusion—*Huseebooddeen* vs. *Naseerooddeen*, S. D., N. W., 1864, p. 389; but in other cases the Court granted leave to withdraw in regular appeal—*Mussamut Khatoon Koonwar* vs. *Baboo Hardoot Narain Singh*, 20 W. R., 163; *Gregory* vs. *Dooley Chand Kandary Mull*, 14 W. R. O., 17; and even in special appeal—*Juggunnath Deb Nazir* vs. *Mohebooollah*, 17 W. R., 164; and this was the procedure followed in Madras—*Kareem Bee* vs. *Begum Bee*, 3 Mad., 368. In Act VIII the corresponding section ran as follows: "At any time *before* final judgment." So that where leave was granted in and not before the final judgment, the point was seized hold of to set aside the order—*Sreemotee Mona Bibee* vs. *Oomed Ali*, 16 W. R., 276; *Anund Mohun Paul Chowdhry* vs. *Ram Kishen Paul Chowdhry*, 2 W. R., 297; *Rajah Sheoraj Nundun Singh* vs. *Rajcoomar Baboo Deo Nundun Singh*, 24 W. R., 23. The words "final judgment" have been omitted, and on the whole the better opinion seems to be that this section applies to a suit at any stage, whether in the original or appellate Courts, and even to proceedings in execution—*Subbaramien* vs. *Ponnusawmy Chetty*, 5 Mad., 298; though not to suits under Act X of 1859—*Beer Chunder Joobraj* vs. *Tarinee Churn Roy*, 11 W. R., 46; but see *Woomanath Roy Chowdhry* vs. *Sreenath Singh*, 15 W. R., 260. As to suits under Act VIII (B. C.) of 1869, see *Ram Churn Banerjee* vs. *Torita Churn Paul*, 18 W. R., 343.

Leave Granted.—Leave has been granted where the plaintiffs were desirous of registering a document on which the suit was based—*Misser Debee Pershad* vs. *Buldeo Pershad*, 6 Alla., 116; or unable to adduce evidence within the period fixed by the Court for hearing—*Issur Chunder Chuckerbutty* vs. *Gopal Lall Mitter*, 16 W. R., 100; when important evidence had been wrongly admitted by the first Court—*Gregory* vs. *Dooley Chand Kandary Mull*, 14 W. R., O. App., 17; where the plaintiff had a good claim for contribution, and the best evidence to determine the amount had not been given—*Mussamut Khatoon Koonwar* vs. *Baboo Hardoot Narain Singh*, 20 W. R., 163; or where the form of the suit was bad—*Juggunnath Deb Nazir* vs. *Mohetoollah*, 17 W. R., 164; *Zahurunnessa* vs. *Khud Yar Khan*, I. L. R., 3 Alla., 325.

Plaintiff can recall his petition of withdrawal any time before the final order has been passed—*Rambhuros Lall* vs. *Gopee Bebee*, 6 Alla., 66; but see *Rajah Shumsher Bahadoor* vs. *Mirza Mahomed Ali Beg*, 3 Agra, 158.

The Court may allow one of several co-plaintiffs to withdraw from a suit without power to bring another even though the other co-plaintiffs do not consent—*Mohamaya Chowdhrain* vs. *Durga Churn Shaha*, 9 C. L. R., 332.

Leave not Granted.—In Madras a party cannot withdraw at all without sanction—*Kareem Bee* vs. *Begam Bee*, 3 Mad., 364; in Bengal if the plaintiff withdraws without express permission to bring a fresh suit, he is precluded from filing a second suit for the same matter—*Juggobando Chatterjee* vs. *Watson*, Bourke, 250; *Aboo Taleh* vs. *Abdool Nubee*, 20 W. R., 415; and if the record does not indicate that permission has been granted, the applicant should apply for a review—*Pearee Mohun Dutt* vs. *Goroodoss Dutt*, 20 W. R., 401. It is not necessary that a suit brought under Act VIII (B.C.) of 1869, should be withdrawn in order to bring a suit under the Procedure Code—*Jallaloodeen* vs. *Burne*, 18 W. R., 99; but see *Ram Churn Banerjee* vs. *Torita Churn Paul*, 18 W. R., 343.

When the defendant has been summoned, it is irregular to grant leave in his absence—*Misser Debee Pershad* vs. *Buldeo Pershad*, 5 Alla., 116. As a rule of practice the other side should be served with due notice of the application for leave when it is made after the notice of the day fixed for hearing has been issued—*Kareem Bee* vs. *Begum Bee*, 3 Mad., 368. But there is no appeal from such an order (section 588), nor can the propriety of it be questioned in the second suit—*Omesh Chunder Mundal* vs. *Thakoor Doss Mookerjee*, 23 W. R., 345.

A person withdrawing without sanction is now liable for costs. This sets aside the case of *Brass* vs. *Teruvengada Pillai*, 1 Mad., 247. See *Kursem Bee* vs. *Begum Bee*, 3 Mad., 363.

After an action had been referred to arbitration and the arbitrator found the facts in regard to all but a small portion against the plaintiff, it was held the plaintiff should not be allowed to withdraw—*Statel Schmidt* vs. *Walford*, 4 Q. B. Did., 217.

Section does not apply.—This section applies only to cases in which the plaintiff withdraws his suit without the defendant's consent. Thus where plaintiff, in pursuance of an agreement to submit the dispute to arbitration entered into with the defendant, withdrew his suit without leave of the Court, it was held that a new suit was not barred by this section —*Juggobundo Chatterjee* vs. *Watson*, Bourke, 163. He might also have sued to enforce the agreement—*Golab Singh* vs. *Cheda Singh*, 3 Agra, 135.

Form of Order.—The proper order to be recorded is not one of dismissal, but one simply permitting the applicant to withdraw the suit with liberty to bring a fresh suit for the same matter on payment of costs, or otherwise as the Court may think fit—*Doucett* vs. *Wise*, 1 W. R., 322.

Where an Appellate Court instead of deciding upon an appeal referred the appellant to a new suit, the order, whether right or wrong, if accepted by the parties is binding on them—*Rajib Sarkhel* vs. *Rajah Nilmonee Sing Deo*, 20. W. R., 44.

Effect of Order —Where a suit was withdrawn in order to bring a fresh suit which would include a portion of the claim arising out of the cause of action, but not included in the suit withdrawn, it was held that the additional portion of the claim was not barred under section 7, Act VIII of 1859—*Ilahi Baksh* vs. *Imam Baksh*, I. L. R., 1 Alla., 324.

Limitation law not affected by first suit.

374. In any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought.

This section applies to H. C. and M. S. C. C.

The parties to a suit executed a written agreement which was duly registered, whereby the plaintiff agreed to withdraw the suit and accept by way of purchase the property of the defendant specified in the agreement, in adjustment of the suit. The agreement was not recorded under the section. Plaintiff proceeded with his suit, obtained a decree, and sold the property and more in execution: Defendant appealed, but his appeal was dismissed on the ground that the agreement entered into was not a final adjustment of the suit which would preclude its being proceeded with. Defendant then sued for specific performance; but his suit was dismissed under section 2 of Act VIII. Finally he sued for damages on account of the sale of the property not mentioned in the agreement, and it was held that he was entitled to recover—*Thota Venkata Chella Sami Chettiar* vs. *Kristnasawmy Iyer*, 8 Mad., 1.

Compromise of suits.

375. If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction.

This section applies to H. C. and M. S. C. C.

A consent decree upon a compromise will not be granted, unless the suit be entered in the cause list of the Court—*Pell* vs. *Valetta*, 5 C. L. R., 464.

The Sudder Dewany held that before deeds of adjustment, withdrawal of claim or the like which may have been filed in Court by a petition, have been brought before the Court for its order and decree in the case, a plaintiff is at full liberty on his own responsibility,

to recall any such application and ask the Court for judgment on the merits and nothing but the act perfected by acknowledgment in Court, and the Court's sanction and adoption of it can deprive him of the right—*Syed Mehdee Alee Khan*, S. D., Sum Decis., May 22nd, 1851; see however *Holt* vs. *Jesse*, 3 Ch. Div., 177.

When a suit is compromised, the compromise ought to be carried out by proper deeds and filed in Court, especially where infants are concerned, so as to have the assent of the Court at the time—*Moulvie Abdool Ali* vs. *Mozuffer Hossen Chowdhry*, 16 W. R., P. C., 22. The Court will then pass a decree so far as it relates to the suit, and such decree will be final and must be set aside before any suit can be brought on the original cause of action. Even a compromise out of Court must be considered as superseding all former rights of suit and to establish the deed of compromise as the only basis of right for the future—*Ameer Begum* vs. *Noor Begum*, 1 Agra, F. B., 1; *Bishnu Coomar Roy* vs. *Moharaj Joy Hurish Chunder Deb Roy*, 2 W. R., 209. Once entered in the decree, the remedy is by execution and not by a new suit—*Luckhee Narain Roy* vs. *Ram Mohun Doss*, 13 W. R., 151; *Gopi Mohun Dass* vs. *Tincouri Gupta*, 1 C. L. R., 254.

Pleaders, unless specially empowered so to do, cannot compromise cases conducted by them—*Mussamut Sirdar Begum* vs. *Mussamut Irrutool Nissa*, 2 Alla., 149; nor can a guardian compromise on behalf of a minor unless the compromise be found to be for the minor's benefit—*Roshun Jehan* vs. *Syed Enaet Hossen*, W. R., 1864 p. 83, see also *Bibee Solomon* vs. *Abdool Azeez*, I. L. R., 6 Cal., 687.

As to how far a compromise entered into by a Hindu widow binds the reversioners, see *Imrit Konwar* vs. *Roopnarain Singh*, 6 C. L. R., 81; *Sheo Narain Sing* vs. *Khurgo Koery*, 10 C. L. R., 336.

A corporation can compromise a suit—In re *Providence Insurance Society*, 8 Ch. Div., 334.

An agreement to take an oath by the parties to a suit, has been held not an adjustment within this section—*Konnapalen Uthatchadayan Haje* vs. *Perotta Meloden Ramen Nambiar*, 4 Mad., 422; *Vasudeva* vs. *Naraina*, I. L. R., 2 Mad., 356. See now Act X of 1873, sections 8, 9, 10; *Issen Meah* vs. *Kalaram Naw*; Sp. Ap. No. 2,390 of 1877, decided April 11, 1878. Where a deed of compromise was filed after judgment had been written and signed, but not delivered, it was held that the Court was bound to pass a decree in accordance with it —*Raj Narain Deb Chowdhry* vs. *Kadir Mohamed*, 1 Shome, 112.

A compromise can only be set aside on the ground of fraud in a regular suit—*Gilber* vs. *Endean*, 9 Ch. Div., 259, 266; *Sheo Gollam Lall* vs. *Beni Prosad*, I. L. R., 5 Cal., 27.

CHAPTER XXIII.

OF PAYMENT INTO COURT.

Deposit by defendant of amount in satisfaction of claim.

376. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

This section applies to H. C. and M. S. C. C.

In regard to denying the plaintiff's cause of action and pleading payment into Court —see *Berdan* vs. Greenwood, 3 Ex. Div., 251.

As to when a Court will, in a suit for account, direct payment into Court see *the London Syndicate* vs. *Lord*, 8 Ch. Did., 84.

Notice of deposit.

377. Notice in writing of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

This section applies to H. C. and M. S. C. C.

See section 36, *ante*. It would appear as if the money should be paid to the plaintiff's agent or pleader unless the Court required his attendance in person.

Interest on deposit not allowed to plaintiff after notice.

378. No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited be in full of the claim or fall short thereof.

This section applies to H. C. and M. S. C. C.

The general rule is that a creditor is not bound to accept a sum tendered to him which is less than what is due to him. He is entitled to require payment of the principal and interest in full, and his refusal to receive part of what is due to him will not deprive him of his right to interest—*Kunya Singh* vs. *Troydan Singh*, 7 W. R., 20; *Watson & Co.* vs. *Dhonendra Chunder Mookerjee*, I. L. R., 3 Cal., 16. This rule has not been fully followed out in our Courts, and judgment-debtors have been allowed the benefit of their deposits in the way of giving interest on the sum deposited—*Poreshnath Mookerjee* vs. *Kristo Mohun Shaha*, 12 W. R., 50, from the date of notice—*Kalee Dass Ghose* vs. *Puran Koomaree Bibee*, 16 W. R., 304. Whether it governs cases in which the tender is made direct to the creditor is doubtful—*Chunder Kant Mookerjee* vs. *Judoo Nath Khan*, 1 C. L. R., 470.

As to what constitutes an unconditional tender, see *Chunder Caunt Mookerjee* vs. *Jodoonath Khan*, I. L. R., 3 Cal., 468.

Procedure where plaintiff accepts deposit as satisfaction in part.

379. If the plaintiff accept such amount only as satisfaction in part of his claim, he may prosecute his suit for the balance; and if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff must pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

Procedure where he accepts it as satisfaction in full.

If the plaintiff accept such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pass judgment accordingly, and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations.

(*a*) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(*b*) B sues A under the circumstances mentioned in illustration (*a*). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shewn that the litigation was necessary.

(*c*) A owes B Rs. 100 and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed, A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. B accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

This section applies to H. C. and M. S. C. C.

In an action to recover Rs. 25,378, defendants tendered Rs. 11,619, and on settlements of issues paid in by leave of the Court Rs. 17,645, which the plaintiff accepted. *Held*, plaintiff was entitled to his costs down to the settlement of issues —*Ardesir Limje* vs. *Sorabji Pestanji*, 1 Bom., 70.

CHAPTER XXIV.

OF REQUIRING SECURITY FOR COSTS.

When security for costs may be required from plaintiff at the stage of suit.

380. If, at the institution or at any subsequent stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India independent of the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time to be fixed by the order, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

This section applies to H. C. and M. S. C. C.

As to security where an appeal has been filed, see section 549, *post*.

The inhabitant of a foreign territory, such as Hill Tipperah, must give security, even though the defendant is also a resident in foreign territory—*Koroona Moyee Debia* vs. *Ooma Churn Deb*, 12 W. R., 465; or he is as plaintiff a relator suing to enforce a public right—*Casee Muzhur Hossein* vs. *Denobundoo Sein*, Bourke, 40; but a plaintiff residing in British territory, though in another province is not so bound—*Gahan* vs. *Owen*, Coryton, 11.

The law apparently does not require the personal attendance of the sureties in Court, though such attendance is customary; see *Rajah Man Singh* vs. *Julaloodeen*, S. D., N. W., 1854, 358. If security has been furnished, fresh security will not be demanded unless it is shewn that the sureties are in no wise subject to and have no property within jurisdiction—*Gibson* vs. *Chisholm*, Fulton, 480.

Where an appellant in bankrupty failed to give security for costs, and the respondent without previously writing to appellant's solicitors gave notice of motion to dismiss the appeal and subsequently the security was given, it was held that the appellant was liable for the costs of the motion—*Ex parte Isaacs*, 10 Ch. Div.; and see in re *Carta Para Mining Compy*; 19 Ch. Did., 457.

The mere presence in British territory at the time of suit will not get rid of the liability to give security, and in one case a residence of four months with a statement that the residence was intended to be permanent was considered insufficient—*Mahomed Shuffi* vs. *Laldin Abdulla*, I. L. R., 3 Bom., 227.

Under the present Code it would appear that if a suit is brought by collusion or instigation of a third party, plaintiff cannot be called on to give security. He could formerly—*Gobind Dass* vs. *Ramsahoy Jemadar*, Fulton, 157.

The heirs of a Hindu testator suing the trustees of a religious trust created by the testator but in which the heirs have no interest should give security for costs—*Brojomohun Dass* vs. *Hurrolall Dass*, 6 C. L. R., 58.

For the proper mode of proceeding on a security bond see *Poynor Bibee* vs. *Nujjoo Khan*, I. L. R., 5 Cal, 437.

381. In the event of such security not being furnished within the time so fixed, the Court shall dismiss the suit unless the plaintiff or plaintiffs be permitted to withdraw therefrom under the provisions of section 373.

Effect of failure to furnish security.

This section applies to H. C. and M. S. C. C.

382. Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of section 380.

Residence out of British India

This section applies to H. C. and M. S. C. C.

When a plaintiff leaves British India before the case is decided, the defendant should apply to the Court under this section to take security for costs—In re *Calcutta and South Eastern Railway Company*, 8 W. R., 207; and then, unless there is a reasonable probability that he will be forthcoming whenever he may be called on to pay costs, or that he has sufficient immoveable property in British India to meet them, he must give security.

As to security in appeals, see section 549, *post*.

CHAPTER XXV.

OF COMMISSIONS.

A.—Commissions to examine Witnesses.

383. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of persons resident within the local limits of its jurisdiction, who are exempted under this Code from attending the Court, or who are from sickness or infirmity unable to attend it.

Cases in which Court may issue commission to examine witness.

This section applies to H. C. and M. S. C. C.

The Court has a discretion to grant or refuse a commission and the question is whether a sufficient case has been made out—*Burney* vs. *Eyre*, 1 Hyde, 68; but it is not a fair exercise of that discretion to refuse because the Judge does not exactly see the useful end that might be obtained by examining the witnesses—*Hurec Dass Bysack* vs. *Meer Moazzum Hossein*, 15 W. R., 447.

A commission will be granted nearly as a matter of course, to examine a material witness if any way ill or infirm—*Hurec Dass Bysack* vs. *Meer Moazzum Hossein*, 15 W. R., 477; even if the cause is on the peremptory board of the day, if the issuing of it is not calculated to prejudice the defendants or subject them to loss or inconvenience *Jansch* vs. *Dundas*, 1 Hyde, 269; and the costs are generally costs in the cause—*Gahan* vs. *Owen*, Coryton, 11; but a commission will not issue to examine a party at his own instance and to enable him to give evidence in his own favour unless he can shew that he is seriously ill, &c.—*Doucett* vs. *Wise*, 1 Ind. Jur., N. S., 357; nor to examine a lady not exempted under the Code, as she may be examined in

her palki—*Nusrul Banoo* vs. *Mahomed Sayem*, 18 W. R., 230; nor an infant of tender years—Re *Sreemutty Beashadceny*, 2 Hyde, 152; nor for any cause not stated in the section—*Marshall* vs. *Chirne*, 2 Tay. and Bell, 194.

A commission cannot issue save under the circumstances stated in the section. It cannot issue to a Magistrate to take the evidence of a prisoner simply because he cannot attend—*Gopal Chunder Sircar* vs. *Kurnodhar Moochee*, 7 W. R., 349.

As to the procedure in case of prisoners see Act XV of 1869, part III.

Order for commission.

384. Such order may be made by the Court either of its own motion, or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

This section applies to H. C. and M. S. C. C.

A commission should not issue without notice to the opposite party—*Tarucknath Mookerjee* vs. *Gouree Churn Mookerjee*, 3 W. R., 147.

When witness resides within Court's jurisdiction.

385. The commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute the same.

This section applies to H. C. and M. S. C. C.

Person for whose examination commission may issue.

386. Any Court may in any suit issue a commission for the examination of—

(*a*) any person resident beyond the local limits of its jurisdiction;

(*b*) persons who are about to leave such limits before the date on which they are required to be examined in Court; and

(*c*) civil and military officers of Government who cannot, in the opinion of the Judge, attend the Court without detriment to the public service.

Such commission may be issued to any Court, not being a High Court or the Court of the Recorder of Rangoon, within the local limits of whose jurisdictiou such person resides, or to any pleader of a High Court whom the Court issuing the commission thinks fit to appoint.

The Court on issuing any commission under this section shall direct whether the commission shall be returned to itself or to any Subordinate Court.

This section applies to H. C., P. S. C., and M. S. C. C.

The Court has a discretion to refuse or grant a commission to examine a person beyond the local limits—*Burney* vs. *Eyre*, 1 Hyde, 68; but the discretion must be exercised judicially—*Huree Dass Bysack* vs. *Meer Moazzum Hossein*, 15 W. R., 447; and the application should be supported by some reason other than the mere distance of the residence of the witness. If the witness is a stranger, a commission will be right

and reasonable but not if he is the servant of the applicant—*Amirth Nath Jha* vs. *Dhunpht Singh Bahadoor*, 20 W. R., 253 ; costs will be costs in the cause—*Gahan* vs. *Owen*, Coryton, 11.

It will be granted as a matter of course to examine a material witness, but not a party at his own request, unless he can shew every strong reasons—*Doucett* vs. *Wise*, 1 Ind. Jur., N. S., 357 ; notice should be given to the opposite party—*Tarucknath Mookerjee* vs. *Gouree Churn Mookerjee*, 3 W. R., 147.

Resident.—A was imprisoned for a criminal offence in a jail outside the local limits of a Small Cause Court, and the Judge issued a commission to the Magistrate to examine him. *Held*, that as A's family continued to reside within jurisdiction, the fair inference was A intended to return and no commission should issue—*Gopal Chunder Sircar* vs. *Kurnodhur Moochee*, 7 W. R., 349.

Commission to examine witness not within British India.

387. When any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that his evidence is necessary, the Court may issue such commission.

This section applies to H. C. and M. S. C. C.

This section is much wider than section 177 of Act VIII. If witnesses are examined under oath or affirmation, as required by the commission, the evidence will be admissible without the consent of the parties, upon proof being given of the facts required by section 390 to be proved in order to render the depositions capable of being read in evidence—*Aga Mohammed Jaffer Tehrani* vs. *Mirza Nazirullah*, 2 B. L. R., 73.

Six months has not been considered too long for a commission for the examination of witenssos in England to be outstandings—*Mackellar* vs. *Wallace*, Fulton, 16.

Court to examine witness pursuant to commission.

388. Every Court receiving a commission for the examination of any person shall examine him pursuant thereto.

This section applies to H. C. and M. S. C. C.

Return of commission with depositions of witnesses.

389. After the commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court out of which it issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order ; and the commission and the return thereto, and the evidence taken under it, shall (subject to the provisions of the next following section) form part of the record of the suit.

This section applies to H. C. and M. S. C. C.

It is the duty of the party obtaining a commission for the examination of witnesses to take all such steps as are necessary to secure their attendance before the Commissioner—*Leckraj* vs. *Palee Ram*, 2 Alla., 210. They must be examined by counsel and not by attorney—*Hoffman* vs. *Framjee*, Coryton, 7. A party who has not joined in a commission is entitled to cross-examine the witnesses examined under it—*Gregory* vs. *Dooley Chand Kandary Mull*, 14 W. R., O. J., 17.

The return should shew on the face of it that the Commissioner had administered the oath to himself and the interpreter (if any)—*Prankrishna Chandra* vs. *Biswanath Chandra*, 8 B. L. R. App., 101 ; and that the evidence was recorded as the law requires—*Bala Thakoor* vs. *Meghburn Singh*, 14 W. R., 269, and taken within the period allowed. The commission

may be open, or to be executed on or before a certain date. Where a Commissioner took evidence after the last return day had expired, it was held that the depositions were inadmissible—*Gregory* vs. *Dooley Chand Kandary Mull*, 14 W. R., 17.

Documents attached to the return of a commission, and identified with the documents referred to in the evidence, may be read at the hearing of the suit in which the commission issued, unless they have been objected to on being tendered in evidence before the Commissioner. Objection to the inadmissibility of such document should be taken before the Commissioner—*Struthers* vs. *Wheeler*, 6 C. L. R., 109.

When depositions may be read in evidence.

390. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless

(*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or

(*b*) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in the last preceding clause, and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

This section applies to H. C. and M. S. C. C.

It is the duty of the party obtaining the commission to tender the return in evidence.

Defendant was examined by commission at her own request, and plaintiff proposed to read part of her evidence, contending that though the defendant had not formally put in the Commissioner's return yet it formed part of the record (see section 393) and gave him the right to reply, and his contention prevailed—*Dwarkanath Dutt* vs. *Gunga Dayi*, 8 B. L. R. App., 102.

A Court may refuse to hear evidence taken by commission unless it has been proved that the witness is beyond the jurisdiction, dead or unable to attend, &c., at the time of trial—*Rajah Prithee Bullubh Pal Sree Chundun Mari Sultan* vs. *Hara Dhun Shome*, 22 W. R., 331; but where it appears from the deposition itself that the person was examined outside jurisdiction, that is sufficient—*Girdhur Nagjishet* vs. *Gunput Moroba*, 11 Bom., 132.

Provisions as to execution and return of commissions to apply to commissions issued by foreign Courts.

391. The provisions hereinbefore contained as to the execution and return of commissions shall apply to commissions issued by

(*a*) Courts situate beyond the limits of British India and established by the authority of Her Majesty or of the Governor-General in Council, or

(*b*) Courts situate in any part of the British Empire other than British India, or

(*c*) Courts of any foreign country for the time being in alliance with Her Majesty.

This section applies to H. C. and M. S. C. C.

B.—Commissions for local Investigations.

Commission to make local investigations.

392. In any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits, or damages or annual nett profits, and the same cannot be conveniently conducted by the Judge in person, the Court may issue a commission to such person as it thinks fit, directing him to make such investigation and to report thereon to the Court:

Provided that, when the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

This section applies to H. C. and M S. C. C.

A Judge is allowed the widest discretion in granting or refusing a local investigation—*Nerod Krishna Roy* vs. *Woomanath Mookerjee*, I. L. R., 4 Cal., 718; 3 C. L. R., 235. There is no appeal from his order, and though the propriety of it may be questioned in regular appeal (section 588), it cannot be made the basis of a special appeal—*Graham* vs. *Lopez*, 1 W R., 141; *Bykunt Nath Sein* vs. *Pearee Monee Dassee*, id., 196; *Poorno Persad Roy* vs. *Chundernath Chatterjee*, id., 249; *Kristo Chunder Goopto* vs. *Brojo Mohun Dey*, 22 W. R., 183; but see—*Rash Beharee Singh* vs. *Saheb Roy*, 12 W. R., 76. He is not bound to issue a commission of his own motion—*McDonald* vs. *Munar Roy*, 3 W. R., Act X, 153. He should refuse it when the matter can be conveniently disposed of by himself, such as examining witnesses—*Shadhoo Singh* vs. *Ramanoograha Lall*, 9 W. R., 83; *Shustee Ram Pal* vs. *Nobo Kant Roy Chowdhry*, 14 W. R., 190; but see *Kristo Chunder Goopto* vs. *Brojo Mohun Dey*, 22 W. R., 183; and if he grants it he should take care not to delegate his functions to the Ameen, such as the trial of one of the more important issues in the case—*Buroda Churn Bose* vs. *Ajoodhya Ram Khan*, 23 W. R., 287, but confine him to obtaining such information (with regard to the physical features of the place in dispute, the identification of land depicted in maps with the parcels which are the subject of the suit, the identification of maps with one another by the aid of objects to be found on the land), as ought to be obtained on the spot—*Bindabun Chunder Sirkar Chowdhry* vs. *Nobin Chunder Biswas*, 17 W. R., 282; *Iswarchandra Das* vs. *Jugal Kishore Chuckerbutty*, 4 B. L. R. App., 33; 21 W. R., 281; *Ram Dhun Dey* vs. *Ram Monee Dey*, 21 W. R., 280; *Kalee Doss Acharjee* vs. *Khettro Pal Singh Roy*, 17 W. R., 472; and where the Court considers it necessary to order an inquiry into the value of certain moveables, such an inquiry cannot be left to be made after decree—*Jugodumba Debia* vs. *Rohinee Debia*, 23 W. R., 423. It has been held that an Ameen should not be deputed in a case of disputed boundary where the question turned chiefly on possession before the date of the suit—*Kalee Dass Acharjee* vs. *Khettro Pal Singh Roy*, 17 W. R., 472.

When a Judge has ordered a local investigation, his successor should not interfere with the order, but carry it out before disposing of the case—*Shurrioollah* vs. *Bawl Mundul*, 1 W. R., 102. Nor, where one inquiry has been carried on, should a second issue for the same purpose without setting aside the first—*Nowab Syud Azim Ali Khan* vs. *Suruswaty*, 23 W. R., 93.

A Collector can issue a commission under Act X, 1859, at any stage of the case—*Rughoonath Panjah* vs. *Sreejeeb Ghossal*, 6 W. R., Act X, 11; *Gour Chunder Roy* vs. *Rash Beharee Dutt*, 10 W. R., 43; but he cannot delegate his power under section 38, Act VIII, 1859, to the Ameen—*Shetal Shaikh* vs. *Hills*, 24 W. R., 184.

Notice should be given to the parties of the time when the local investigation will be held—*Kristo Monee Debia* vs. *Eglinton*, 12 W. R., 139; *Jhubhoo Sahoo* vs. *Mussamut Jasoda Kooer*, 17 W. R., 230.

Such person.—It is not necessary now that the Commissioner should, if possible, be an Officer of Court—See *Doorga Dass Chatterjee* vs. *Gooroo Churn Mistree*, 6 W. R., Act X, 81. The Judge of the first Court should not be deputed to hold a local enquiry by the Appellate Court—*Roy Sultan Bahadoor* vs. *Mussamut Laloo Kooer*, 17 W. R., 300

In appeal, the District Judge reversed the decision of the Subordinate Judge, remanded the case and ordered a fresh local enquiry by the Munsif, but as he was unable to go the Judge appointed his sherishtadar. The Subordinate Judge acted on his report. On appeal to the Judge the plaintiff objected to the report on the ground of partiality. It was held he could not afterwards object to the report on the ground that the Judge had no authority to remand the case—*Mahomed Anjob* vs. *Gouree Pershad*, 16 W. R., 62

Procedure of Commissioner.

393. The Commissioner, after such local inspection as he deems necessary, and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing, signed with his name, to the Court.

Report and depositions to be evidence in suit.

Commissioner may be examined in person.

The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court, or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to the manner in which he has made the investigation.

This section applies to H. C. and M. S. C. C.

A day should be fixed for the return of the Ameen's report—*Ram Narain Singh* vs. *Goburdhun Lall Chowdhry*, 21 W. R., 2.

An Ameen's report, if the investigation has been completed—*Kalee Dass Mitter* vs. *Deb Narain Deb*, 13 W. R., 412, is evidence upon whatever materials it is based—*Chunder Coomar Dutt* vs. *Joy Chunder Dutt*, 19 W. R., 213; *Jannobee Chowdhrain* vs. *The Collector of Mymensingh*, 8 W. R., 287; *Sheo Narain Bhuggut* vs. *Boodh Singh*, 11 W. R., 424; though the depositions are not attached—*Chunder Monee Dossee* vs. *Nilambur Mustoffee*, 7 W. R., 43; or, if attached, have been partly rejected as not taken on oath—*Dole Gobind Sing* vs. *Chamoo Sing*, 10 W. R., 312, (else they are also admissible—*Khajah Abdool Gunee* vs. *Bhuttoo Sheikh*, 22 W. R., 350); or the commission had been granted without sufficient reason—*Shah Nuthoo* vs. *Ghannessam Singh*, 8 W. R., 267, or irregularly—*Umbica Churn Dey* vs. *Goluck Chunder Chuckerutty*, 9 W. R., 596; *Rajnath Pandah* vs. *Doorga Lall*, 12 W. R., 136; but see *Ram Dhun Dey* vs. *Ram Monee Dey*, 21 W. R., 230; otherwise if the Ameen has held the enquiry beyond the territorial jurisdiction of the Court directing it—*Nidhoo Sircar* vs. *Phillipe*, 10 W. R., 153.

Form part of the Record.—The report and depositions are to be taken as evidence in the case—not conclusive evidence,—and form part of the record—*Azim Sarung* vs. *Alimooddeen*, 17 W. R., 270; and must be taken into consideration by the Appellate Court—*Rajnath Pandah* vs. *Doorga Lall*, 12 W. R., 136; and unless any objection is raised to the report in the first Court or in the grounds of appeal, it should not be listened to—*Seths Guj Mull* vs. *Mussamut Chahee Kowar*, L. R., 2 Ind. App., 34; but see *Tweedie* vs. *Poorno Chunder Gangolee*, 12 W. R., 138.

The value of the report depends upon the evidence on which it is founded—*Braja Sundari Deoya* vs. *Panchanun Bose*, 3 R. J. and P., 339; *Issure Chunder Dass* vs. *Joogul Kishore Cuckerbutty*, 21 W. R., 281. A Court may reject part and accept part—*Poreshnauth Mookerjee* vs. *Martin*, 1 W. R., 93.

An Appellate Court should not interfere with the result of a local enquiry except on clearly defined and sufficient grounds, which must be stated in its judgment—*Ranee Surut Soonduree Dossee* vs. *Baboo Prosunno Coomar Tagore*, 15 W. R., 20; 13 Moore 607; but see—*Protab Chunder Burroah* vs. *Ranee Surnomoye*, 19 W. R., 361; especially if it has been accepted by the first Court. Nor should a Court of First Instance question the correctness of map attached to a report, which is not impugned by either party—*Brijonath Chowdry* vs. *Lall Meah Munneepooree*, 14 W. R., 391; but see *Mahomed Anwar Chowdhry* vs. *Raj Chunder Ghose*, 17 W. R., 522. If the Court finds the report deficient in any point it should send for the Commissioner

and examine him—*Sheodyal Singh* vs. *Hodgkinson*, 24 W. R., 342; on the other hand, it should not be made the basis of a judgment to the total disregard of the other evidence on the record—*Bustee Sahoo* vs. *Jeo Narain Singh*, 24 W. R., 338.

Practice.—On the return of the Commissioner's report a day should be fixed to hear objections and notice given to the parties—*Ram Narain Singh* vs. *Goburdhun Lall Chowdhry*, 21 W. R., 2.

C—Commissions to examine Accounts.

Commission to examine or adjust accounts.

394. In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

This section applies to H. C. and M. S. C. C.

The High Court at Calcutta has held that when the books are in Court, and not impugned, a commission should not issue, and if it does issue, in no case can the Commissioner examine witnesses—*Chand Ram* vs. *Brojo Gobind Dass*, 19 W. R., 14. This decision cannot be now considered good law (see section 398).

Where a decree has been passed referring the matter to the Commissioner's office to have accounts taken and property sold, the Court has still power to add a party to the suit—*Vakatchand Lakhmichand* vs. *The Advocate General*, 8 Bom., 96.

As to the procedure in taking accounts, see *Degamber Mazimdar* vs. *Kallynath Roy*, I. L. R., 7 Cal., 654; *Anoda Persad Roy* vs. *Dwarkanath Gangopadhya*, I. L. R., 6 Cal., 754.

Court to give Commissioner necessary instructions.

395. The Court shall furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the enquiry, or also to report his own opinion on the point referred for his examination.

Court to receive Commissioner's proceedings, or direct further inquiry.

The proceedings of the Commissioner shall be received in evidence in the suit, unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite.

This section applies to H. C. and M. S. C. C.

As to the nature of the certificate or report made by the Commissioner, what it should contain and how far the Court can deal on motion, with matters before him, see the case of *Rustomji Burjorji* vs. *Kessowji Naik*, I. L. R., 3 Bom., 161.

The Commissioners under this section need not be sworn or affirmed—*Rai Nursing Dass* vs. *Rai Narain Dass*, 3 Alla., 217.

In Madras, Appellate Courts do not enter into the details of an account taken by a Commissioner and discussed in the first Court, especially if no particular items are objected so: they only decide the principle upon which the account should be taken—*Venkata Reddi* vs. *Venkatara Maiya*, 1 Mad., 418; *Sarapee Venkadesan* vs. *Malai Isvaraiya*, id., 1; and where a Commissioner was appointed to investigate the state of accounts between the parties, and the judgment was founded on his report, the High Court, on regular appeal refused to take a fresh account—*Sarapu Vankadesan* vs. *Mala Isvaraiyya*, 1 Mad., 1. In Bombay the opposite opinion prevails, and there the Appellate Courts, if dissatisfied for any reason, direct further enquiry—*Ahmed* vs. *Khasaji*, 6 Bom., 148.

Where an Ameen was directed by an order of Court to adjust an account, and no objection was taken to his proceedings by the plaintiff in whose presence the account was aken: *Held*, the account should not have been disturbed by the Appellate Court—*Kantee Chunder Dutt* vs. *Gopee Madhub Neogee*, 11 W. R., 3.

Plaintiff sued his mohurrir the defendant for an account of such sums as he would be found to have mis-appropriated (estimating it at 2,500 rupees) and filed his account books in Court without alleging that they had been tampered with. *Held*, that he should have made up the account himself, and should not have been allowed an Ameen—*Chand Ram* vs. *Brojo Gobind Dass*, 19 W. R., 14.

In a suit for account it was ordered, by consent of parties, that the cause should be referred to a Commissioner to take accounts who in taking them was to decide on all questions of fact leaving questions of law to the Court. *Held*, that the reference was different from the ordinary reference under section 181, Act VIII of 1859, and that it was doubtful whether the Court could re-open a question of fact relating to the account decided by the Commissioner—*Watson* vs. *Mehedee Sherazee*, L. R., 1 Ind. App., 346.

An Ameen deputed under this section cannot record evidence, and the depositions of any persons examined by him are not evidence—*Chand Ram* vs. *Brojo Gobind Doss*, 19 W. R., 14.

D.—Commission to make Partition.

Commission to make partition of non-revenue-paying immoveable property.

396. In any suit in which the partition of immoveable property not paying revenue to Government appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to made a partition according to such rights.

Procedure of Commissioners.

The Commissioners shall ascertain and inspect the property, and shall divide the same into as many shares as may be directed by the order under which the commission issues, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

The Commissioners shall then prepare and sign a report, or (if they cannot agree) separate reports, appointing the share of each party, and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall either quash the same and issue a new commission, or (where the Commissioners agree in their report) pass a decree in accordance therewith.

This section applies to H. C. and M. S. C. C.

Commissioners.—The Court is not bound to appoint more than *one* Commissioner—*Gyan Chunder Sen* vs. *Durga Churn Sen*, 8 C. L. R., 415; I. L. R., 7 Cal., 313.

Not Paying Revenue.—A suit for partition of revenue-paying land is not cognizable in the Civil Court, though a suit to define plaintiff's share and then to refer the partition to the Collector is within jurisdiction—*Ruttun Monee Dutt* vs *Brojo Mohun Dutt*, 22 W. R., 11; *Ajoodhia Lall* vs. *Gumani*, 2 C. L. R., 134; *Chundernath Nundi* vs. *Hur Narain Deb*, I. L. R., 7 Cal., 153.

In effecting a partition under this section, the rules laid down in Regulation XIX of 1814, should be followed as far as they are applicable—*Janokee Bibee* vs. *Luchmun Pershad*, 17 W. R., 137.

Commissioners have been looked on as officers of Court acting by a majority, although there is no clause so directing in the commission—*Rajendra Matilal* vs. *Ramnarayan Matilal*, 3 B.L.R., App., 3; it will be different in future as regards Commissioners appointed to make a partition. Commissioners have no lien on the return for their fees, and cannot refuse to give it up until they are paid—*S. M. Rajmoheeny Dabea* vs. *Muddosoodun Dey*, Bourke, 24. The case of *Azim Sarung* vs. *Alimooddeen*, 17 W. R., 270, will not apply to cases under the new Code.

E.—General Provisions.

Expenses of commission to be paid into Court.

397. Before issuing any commission under this chapter, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed by the Court, paid into Court by the party at whose instance or for whose benefit the commission is issued.

This section applies to H. C. and M. S. C. C.

In a suit for partition, the costs of a commission to examine a lady issued at her own request were made costs in the suit—*Moniroddin Biswas* vs. *Shoshebhusun*, I. L. R., 5 Cal., 866.

Powers of Commissioners.

398. Any Commissioner appointed under this chapter may, unless otherwise directed by the order of appointment,

(*a*) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(*b*) call for and examine documents and other things relevant to the subject of inquiry;

Ecclesiastical Courts are very unwilling to let wills out of their custody. The Supreme Court has where a commission issued in Calcutta in regard to a will directed its registrar to produce the will before the Commissioners—*Unnopoornah Dabee* vs. *Kolochomoney*, Fulton 83.

(*c*) at any reasonable time enter upon or into any land or building mentioned in the order.

This section applies to H. C. and M. S. C. C.

Instructions to a Commissioner should issue in the presence of the parties, and if they do not object they cannot afterwards complain if the Commissioner carried out his instructions—*Bissessur Roy* vs. *Kanchun Roy*, 11 W. R., 155. Unless limited by the wording of the commission—*Shibo Soonduree Debia* vs. *Ram Chunder Sircar*, 17 W. R., 469, he has the widest power and discretion to enquire into the matters referred to him for investigation—*Mohun Lall Roy* vs. *Unnopoorna Dossee*, 9 W. R., 566; but he cannot go beyond his order—*Ram Dhun Dey* vs. *Ram Monee Dey*, 21 W. R., 280; *Bustee Sahoo* vs. *Jeo Narain Singh*, 24 W. R., 338 or delegate his authority—*Meer Hesmunt Ali* vs. *Mussamut Zullam*, 1 Shome, 15. Thus if he is directed to make an enquiry into mense profits he should not enquire into the date of dispossession, which should have been fixed by the decree—*Bejoy Gobind Naik* vs. *Kallee Prosunno Naik*, 16 W. R., 294. So, he should not record evidence if

expressly restricted to a comparison of the disputed land with a chitta—*Doorga Churn Surmah Chowdhry* vs. *Neem Chand Surmah Chowdhry*, 24 W. R., 208. So, where an Ameen asked leave to inquire into the title by inspecting documents, and was refused, it was held that he could not investigate at all the title or possession—*Shibo Soondurce Debia* vs. *Ram Chunder Sircar*, 17 W. R., 469.

In Bombay, on the original side, an attachment will issue to compel a party to a suit to obey an order made by a Commissioner taking accounts, upon the certificate of the Commissioner that such order has been made and disobeyed, without in the first instance making such order a rule of Court—*Dhurandhardao Sakharam* vs. *Bhaw Gobind*, 10 Bom., 4.

Attendance, examination and punishment of witnesses before Commissioner.

399. The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this chapter, whether the commission in execution of which they are so required has been issued by a Court situate within, or by a Court situate beyond, the limits of British India.

For the purposes of this section, the Commissioner shall be deemed to be a Court of Civil Judicature.

This section applies to H. C. and M. S. C. C.

A person attending before an arbitration appointed by order of Court to take a reference is protected from arrest—In the matter of *Jaggesshur Roy*, 5 C. L. R., 170.

Court to direct parties to appear before Commissioner.

400. Whenever a commission is issued under this chapter, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

Procedure *ex-parte*.

If the parties do not so appear the Commissioner may proceed *ex-parte*.

This section applies to H. C. and M. S. C. C.

A party refusing to appear before an Ameen is not at liberty afterwards to take any objection to his report—*Ramun Doss Mookerjee* vs. *Brojo Kishore Mitter Mojoomdar*, 6 W. R., 130.

The Commissioner may proceed *ex-parte*, but is he compelled to do so? In the case of *Eshan Chunder Chuckerbutty* vs. *Soorjo Loll Gossain*, Marsh., 139, it was decided that where a plaintiff fails to appear before a Commissioner and the defendant appears, the plaintiff is liable to have his suit dismissed with costs.

Charges against Ameens should be quickly inquired into—*Abdul Kureem Biswas* vs. *Campbell*, 8 W. R., 172.

PART III.

OF SUITS IN PARTICULAR CASES.

CHAPTER XXVI.

SUITS BY PAUPERS.

Suits may be brought *in forma pauperis.*

401. Subject to the following rules, any suit may be brought by a pauper.

Explanation.—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

This section applies to H. C. and M. S. C. C.

A plaintiff may be allowed to carry on as a pauper, a suit instituted in the ordinary way —*Nirmul Chandra Mookerjee* vs. *Doyal Nath Bhuttacharjee*, I.L.R., 2 Cal., 130. A Hindu father's wealth is not a bar to a son, suing as a pauper to prove his adoption—*Chutoo Ram Tewari*, petitioner, S. D., *Sum Decis*, Sept. 7, 1846; nor does a husband's wealth preclude a wife from suing as a pauper, when she cannot claim from him the means of carrying on the suit—*Laloonissa*, petitioner, S. D., *Sum Decis*, Dec. 15, 1845. See also *Misser* vs. *Mutty Lall*, Fulton, 490.

A suit can be brought on behalf of a pauper minor by a next friend who is also a pauper—*Golaupmonee Dossee* vs. *Prosonomoyee Dossee*, 11 B.L.R., 373; since the failure of the suit is no ground for throwing the costs of the suit on the next friend—*Brijessuree Dossia* vs. *Kishore Dass*, 25 W. R., 316.

Representative.—There is no necessity to enquire if the representative of a pauper is also a pauper: the Court if satisfied that he is the legal representative should allow him to carry on the suit—*Bhagbut Doss* vs. *Buloram Doss*, 3 W. R., Mis., 20. The Sudder Dewany held that the alleged devisee by *will* of a deceased pauper plaintiff must apply *de novo* for permission to sue as a pauper—*Abe Absun*, petitioner, S. D. *Sum Decis.*, March 1, 1847.

As to the case of an executor defending a suit, where there are no assets, see Seton, p. 886.

A defendant may be allowed to defend a suit in *forma pauperis*—*Doorga Churn Das* vs. *Nittokally Dassee*, 6 C. L. R., 120.

What suits excepted.

402. No suit shall be brought by a pauper torec over compensation for loss of caste, libel, slander, abusive language or assault.

This section applies to H. C. and M. S. C. C.

Subject to these restrictions the privilege extends to actions *Ex delicto* as well as *Contractu*—*Mulah Deen* vs. *Runjeet Singh*, Fulton, 386.

Application to be in writing.
Contents of application.

403. The application for permission to sue by a pauper shall be in writing, and shall contain the particulars required by section 50 in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the petitioner, with the estimated value thereof, shall be annexed

thereto; and it shall be signed and verified in the manner hereinbefore prescribed for the signing and verification of plaints.

This section applies to H. C. and M. S. C. C.

An unsuccessful application of a wife to sue for dower in *forma pauperis*, though opposed by her husband in a counter-petition denying his liability, is not such a demand and refusal of the dower as to constitute a cause of action. The application merely expresses an intention to demand, if allowed to do so, in a particular way—*Ranee Khajooroonissa* vs. *Ranee Ryeesoonissa*, L. R., 2 Ind. App., 235.

Presentation of application.

404. Notwithstanding anything contained in section 36, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court under section 640 or section 641, in which case the application may be presented by a duly authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

This section applies to H. C. and M. S. C. C.

This section is imperative, and a petition to sue in *forma pauperis* must be presented in person unless the pauper is exempted from appearing in Court under sections 640, 641—*Ex-parte Devgirquru Sumbhaqir*, 4 Bom., 91. It is not necessary that the duly authorized agent should be a pauper—*Bhagbut Doss* vs. *Buloram Dass*, 3 W. R., Mis., 20; he may be a pleader—*Kishoree Mohun Bose* vs. *Gour Monee Dossee*, 15 W. R., 198; but then he must be specially authorised as the pauper's attorney; an ordinary vakalutnamah is not sufficient—*Mussamut Bhugabutty Kooer* vs. *Gunesh Dutt*, 21 W. R., 308.

If the applicant does not appear in person he may be examined by commission. See section 406.

Rejection of application.

405. If the application be not framed or presented in the manner prescribed by sections 403 and 404, the Court shall reject it.

Act VIII, 1859, section 302. This section applies to H. C. and M. S. C. C.

Examination of applicant.

406. If the application be in proper form and duly presented, the Judge may, if he thinks fit, examine the petitioner, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

If presented by agent, Court may order applicant to be examined by commission.

When the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken under the provisions of this Code.

This section applies to H. C. and M. S. C. C.

The Judge must conduct the examination under the first clause. He cannot delegate it any other person—*Reg.* vs. *Mir Saheb Kussamia*, 1 Bom., 100.

Rejection of application.

407. If it appear to the Court

(*a*) that the applicant is not a pauper, or

(*b*) that he has, within the two months next before the presentation of the application, disposed of any property fraudulently or with a view to obtain the benefit of this chapter, or

(*c*) that his allegations do not shew a right to sue in such Court, or

(*d*) that he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter,

the Court shall reject the application.

This section applies to H. C. and M. S. C. C.

The examination referred to in this section is that of the petitioner or his agent, and at this stage the Court has no power to examine witnesses—In the matter of *Purkash Ojha*, Petitioner, 25 W. R., 74.

If it appears that the suit is bad on the merits—*Chunder Churn Paul* vs. *Ram Narain Sein*, Coryton, 8; or barred—In the matter of *Purkash Ojha*, Petitioner, 25 W. R., 74; or that the Court has no jurisdiction—In the matter of *Gungadass Adhikaree*, 14 W. R., 281; or that a previous application has been refused—*Baboo Bisheshur Singh* vs. *Maharajah Moheshur Buksh Singh*, S. D., N. W., 1864, 189; or, that any other of the circumstances mentioned in this section exists, the Judge must reject the application.

Appeal.—There is no appeal from an order rejecting an application under this section, —section 588. It cannot be set aside under the Charter Act—In the matter of *Shaikh Babur Ali*, 24 W. R., 62; *Khojedoonnissa*, Petitioner, 7 W. R., 486.

Notice of day for receiving evidence of applicant's pauperism.

408. If the Court sees no reason to refuse the application on any of the grounds stated in section 407, it shall fix a day (of which at least ten days' previous notice shall be given to the opposite party and the Government Pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

This section applies to H. C. and M. S. C. C.

Procedure at hearing.

409. On the day so fixed, or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may cross-examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by

the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in section 407.

The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

This section applies to H. C., except so much as requires the making of a memorandum, and M. S. C. C.

It a pauper adds in his plaint to the defendants named in his application to sue as a pauper, an enquiry into his possession of property, &c., must be gone into Court in the presence of the new defendants—*Hur Chunder Lahori*, petitioner, S. D., *Sum Decis.*, July 26, 1847.

The examination must be conducted by the Judge in person—In the matter of *Eknathbin Madhoba*, 1 Bom., 102; and it is not limited to the question of pauperism; but embraces all the matters referred to in section 407—In the matter of *Gunga Adhikaree*, Petitioner, 14 W. R., 281; 11 B.L.R., App., 23. The previous cases on this point, and also in the matter of *Purkash Ojha*, 25 W. R., 74, must be considered as not now law.

No day was fixed, and on default by non-appearance, the Judge struck off the application "for the present." It was held that, as there had been no refusal to allow the applicant to sue as a pauper, the applicant might renew his application—*Rajah Bhoj Singh* vs. *Ranee Maha Koonwer*, 3 Agra, Mis., 1. So an application struck off for want of prosecution, may be re-admitted—In the matter of *Rani Umasundari Debi*, 5 B. L. R., App., 29.

A successfully opposed an application to sue in *forma pauperis* in a Subordinate Judge's Court on the ground of over-valuation. *Held*, he could not afterwards turn round and object to the jurisdiction of the Munsif—*Brohmo Moyee Dassia* vs. *Anand Chunder Chatterjee*, 22 W. R., 120.

A was allowed to sue in *forma pauperis* by the Delhi Court. Subsequently his application was returned, on the ground of non-jurisdiction, for presentation in the Court at Meerut. *Held*, the Meerut Court was not bound by the previous order, but should proceed *de novo*. *Held*, also that the time spent in prosecuting the suit in the Delhi Court should be deducted—*Skinner* vs. *Orde*, 6 Alla., 225; I.L.R., 1 Alla., 230. But see *Ram Sahai Singh* vs. *Maniram*, 6 C. L. R., 223, where the High Court refused to interfere under section 622.

An order under this section refusing leave to sue as a pauper is subject to review—*Adarji Edulji Golakhana* vs. *Manikji Edulji*, I. L. R., 4 Bom., 414.

Procedure if application admitted.

410. If the application be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted under chapter V, except that the plaintiff shall not be liable to any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader, or other proceeding connected with the suit.

This section applies to H. C. and M. S. C. C.

When an application is granted it cannot be set aside on appeal or motion by a superior Court. If, subsequently to permission being granted, it appears that the order has been obtained improperly, application should be made to the Court out of which the order issued—In the matter of *Khodejoonissa*, 7 W. R., 486. But the propriety of the order can be contested if the case is appealed; and where a Court gave leave to sue in *forma pauperis*, a previous application having been refused, the suit was dismissed on appeal—*Baboo Bishessur Singh* vs. *Maharaja Muhessur Baksh Singh*, S. D., N. W., 1864, p. 189.

Limitation depends on the date of the application and not on the day when the application is granted and registered—*Dhaole* vs. *Samval*, 4 Bom., 39; *Seetaram Gower* vs. *Golukinath Dutt*, Marsh., 174; *Naragunty Lutchmee Davamah* vs. *Vengama Naidoo*, 9 Moore, 94. See also *Skinner* vs. *Orde*, I.L.R., 1 Alla., 230; *Khem Karak* vs. *Har Dyal*, I. L. R., 4 Alla., 37.

The exemption from liability to pay stamps only extends to the cases mentioned in the section. A pauper must pay the proper stamp and penalty (if any) on a document on which he relies—*Golam Guffoor* vs. *Ekram Hossein*, 10 W. R., 357.

Costs when pauper succeeds.

Recovery of court-fees.

411. If the plaintiff succeed in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and such amount shall be a first charge on the subject-matter of the suit, and shall also be recoverable by the Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable under this Code.

This section applies to H. C. and M. S. C. C.

Government has no lien on the decree for the stamps. It can recover their value in the same manner as cash; but has no higher position than an ordinary judgment-creditor. So where Government, after attaching plaintiff's decree, consented to its sale in execution of a decree against the pauper, and obtained an order by which it secured any surplus that might arise from the sale, it was held that it could not follow the purchaser when the sale did not yield a surplus—*Prau Kisto Roy* vs. *Collector of Moorshedabad*, 15 W. R., 205. In Bombay Government has the first claim to the proceeds of a pauper suit to the extent of the amount of the court-fee—*Ganpat Putaya* vs. *The Collector of Kanara*, I. L. R., 1 Bom., 7, and this decision has been approved by the North-West High Court—*The Collector of Moradabad* vs. *Mahomed Daim Khan*, I. L. R., 2 Alla., 196.

A pauper suit for possession was decreed, with mesne profits to be ascertained in execution, and Government was to be paid by plaintiff and defendant in shares proportionate to their ultimate shares when the amount of wasilat should be ascertained. The parties did not enquire into the mesne profits, and the Court on the motion of Government called on the parties to appear, and on default changed its order and directed that the fees should be realised from both jointly. *Held*, the first order was improper as a contingent order, but the Court could not change it after the decree had been passed and nothing remained to be done—*Shostee Churn Roy* vs. *The Collector of Chittagong*, 13 W. R., 155.

A claim for fees would be looked upon as a public claim. It was considered not subject to the ordinary rules for limitation in execution of decrees under Act XIV, 1859—*Shami Mohammed* vs. *Munshi Mohammed Ali Khan*, 2 B.L.R., App., 22; *The Collector of South Arcot* vs. *Thatha Charry*, 8 Mad., 40; but under Act IX of 1871, it was held that in Bengal the ordinary period for execution applied—*Collector of Beerbhoom* vs. *Shreehurry Chuckerbutty*, 22 W. R., 512.

Procedure when pauper fails.

412. If the plaintiff fails in the suit, or if he is dispaupered, or if the suit is dismissed under section 97 or 98, the Court shall order the plaintiff, or any person made, under section 32, co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper;

and if it find that the suit was frivolous or vexatious, it may also punish the plaintiff with fine not exceeding one hundred rupees, or with imprisonment for a term which may extend to a month, or with both.

This section applies to H. C. and M. S. C. C.

Where a plaint in *forma pauperis* has been admitted but the Judge, holding he has no jurisdiction, returns the plaint to the plaintiff, he has no jurisdiction to make the plaintiff pay the court-fees—*Collector of Ratnagiri* vs. *Janardan*, I. L. R., 6 Bom., 591.

Where a petition for leave to sue in *forma pauperis* has been filed and is pending and the petitioner pays the necessary amount of stamp fees, the petition should be treated for the purposes of limitation as a plaint from the date on which it was filed and not from the date of payment of the fees—*Skinner* vs. *Orde*, 4 C. L. R., 331.

Where the Court omitted to make an order as to which of the parties was to pay the stamp-fee it was held the error could not be rectified on the application of Government—*Shoshee Churn* vs. *Kamarali*, 1 Shome, 266.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

413. An order of refusal made under section 409 to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by Government in opposing his application for leave to sue as a pauper.

This section applies to H. C. and M. S. C. C.

This section does not apply when the Court has not passed an order of refusal, for instance, if it returns the application to have the question of pauperism tried by a Court of concurrent jurisdiction—*Skinner* vs. *Orde*, 6 Alla., 225; or strikes off "for the present," the application for default by non-appearance—*Rajah Bhaj Singh* vs. *Ram Maha Kooower* 3 Agra, Mis., 1; or dismisses it in default of prosecution—In the matter of *Rani Umasundari*, 5 B.L.R., App., 29. Under such circumstances the application may be renewed or revived.

Dispaupering.

414. The Court may, on motion by the defendant, or by the Government Pleader, of which one week's notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(*a*) if he is guilty of vexatious or improper conduct in the course of the suit;

(*b*) if it appears that his means are such that he ought not to continue to sue as a pauper; or

(*c*) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

This section applies to H. C. and M. S. C. C.

If it appears from facts that have been discovered after permission to sue in *forma pauperis* has been granted, that the applicant ought not be allowed to continue to sue as a pauper, the remedy is by application under this section and not by appeal or motion in the superior courts—In the matter of *Khodejoonissa*, 7 W. R., 486.

Costs.

415. The costs of an application for permission to sue as a pauper and of an inquiry into pauperism are costs in the suit.

This section applies to H. C. and M. S. C. C.

CHAPTER XXVII.

SUITS BY OR AGAINST GOVERNMENT OR PUBLIC OFFICERS.

Suits by or against Secretary of State in Council.

416. Suits by or against the Government shall be instituted by or against (as the case may be) the Secretary of State for India in Council.

The section is new. It applies to H. C. and M. S. C. C.

In all suits against Government the courts should see that the defendant is properly described and that no description is inserted other than what is prescribed by the law. Imperfect plaints should be invariably returned for amendment—Cal. Cir. O. No. 5, 1875.

An action cannot be maintained against the Secretary of State. It must be brought against "the Secretary of State for India in Council"—*P. & O. S. N. Co.* vs. *Secretary of State for India*, Bourke, 167; 5 Bom. App., 1; *Nobin Chunder Dey* vs. *The Secretary of State for India*, I.L.R., 1 Cal., 14; 21 and 22 Vic. Cap., 106, section 65. This error may be waived directly. Thus where A was sued as "Agent to the Governor-General on the part of Government," and defended the suit on behalf of Government through the Government pleader, it was held to be substantially a suit against Government—*Roopun Tewaree* vs. *Buckle*, 10 W. R., 142 and see also the *Municipal Committee* vs. *Moradabad*, I. L. R., 1 Alla., 269.

The Secretary of State must be sued where the cause of action has arisen—*Subaraya Mudali* vs. *The Government and Cunliffe*, 1 Mad., 286; *Rundle* vs *Secretary of State in Council*, 1 Hyde, 39. See also *Hearsay* vs. *Secretary of State*, 6 Alla., 46.

No action will lie against the Government for possession of immoveable property without proof of title—section 9, Act I, 1877; or, on account of its transactions with foreign States—*The Secretary of State for India in Council* vs. *Kamachee Boye Sahaba*, 7 Moore, 477; *Doss* vs. *The Secretary of State for India in Council*, L. R., 19 Eq., 509; or, on account of any act *done* or contract entered into in the exercise of powers usually called sovereign, that is, powers which cannot be lawfully exercised, except by a sovereign or private individual delegated by a Sovereign to exercise them—*P. & O. S. N. Co.* vs. *Secretary of State for India*, Bourke, 167; 5 Bom. App., 1; such as assuming the Government of a country, and resuming a jagheer—*The East India Company* vs. *Syed Ally*, 7 Moore, App., 555; *Bhagwan Singh* vs. *Secretary of State for India*, 2 L. R. Ind. App., 38; or, for seizing the property of a native in a recently conquered country (who had been refused the benefit of the articles of capitulation of a fortress of which he was Governor, but who had been permitted to reside under military surveillance in his own house, where the seizure was made), where the seizure was made, if not *flagrante*, yet *nondum cessante bello*, the country was quiet and the Court sitting—*Elphinstone* vs. *Bedrechund*, 1 Knapp., 316; or on account of any act done by officers and soldiers carrying on hostilities, or for the acts of any naval officers in seizing as prize, property of a subject under the supposition that it was property of an enemy, or for any act done by a military or naval officer, or by any soldier or sailor whilst engaged in military or naval duty, or for the acts of its officers or servants, in the exercise of judicial functions—Reg. XI, 1822, section 38—*P. & O. S. N. Co.* vs. *Secretary of State for India*, 5 Bom. App., Bourke, 167; or for the acts of officers appointed to impose and collect excise duties—*Nobin Chunder Dey* vs. *The Secretary of State for India*, I. L. R., 1 Cal., 11; but see *Secretary of State* vs. *Hari Bhanji*, I. L. R., 5 Mad., 273. In the case of *Dhakji Dadaji* vs. *East India Company*, Perry's O. Cases 343, it was held that after the charter, the Company could not be held liable for the illegal acts of their officers, or committed under the orders of the local Government, such as taking forcible possession of the dwelling house of an ex-Dewan of the Gaekwar of Baroda, resident in Bombay, and the forcible seizure of his papers under the orders of the local Government. The Secretary of State is liable for the acts done by public servants in the conduct of undertakings, which might be carried on by private individauls without having any sovereign powers delegated to them—*P. & O. Co.* vs. *Secretary of State for India*, Bourke, 167; 5 Bom. App., 1, when acting in the discharge of their duty, within the limits of their authority; or, if they exceed that authority, when the Government in fact or in law directly or by implication ratifies the excess—*The Collector of Masulipatam* vs. *Cavaly Vencata Narain Apah*, 8 Moore, 529; 2 W. R., P. C., 61; *The Secretary of State* vs. *Sheo Singh*, I. L. R., 2 Alla., 756. So where Government coolies let fall an iron funnel, which they where carrying from the Kidderpore Dockyard to a steamer in the river, and the noise of its fall startled a horse, and he rushed over it and injured himself, the Secretary of State was held liable—*P. & O. Co.* vs. *Secretary of State for India*, Bourke, 167; 5 Bom. App., 1; and so also he is liable for negligence in the carriage of goods by the Government bullock train—*Id.*; *The Deputy Post Master of Bareilly* vs. *Earle*, 3 Alla., 195. But where an officer in the Public Works Department entered into a contract in excess of his authority, it was held that Government was not bound by it—*Beer Kishore Sahoy* vs. *Government of Bengal*, 17 W. R., 497.

Not an act of State.—Lands were held as *jagheer* under the Sovereign of an independent State, and on the conquest of the territory by the East India Company the *jagheerdar* remained in the same position towards the Company: *Held*, the seizure of the tenure, and the arms and stores pertaining to it after the death of the *jagheerdars* was not an act of State. Their Lordships of the Privy Council said:—

"The act of Government in this case was not the seizure by arbitrary power of territories, which up to that time had belonged to another Sovereign State: it was the resumption of lands previously held from the Government under a particular tenure upon the alleged determination of that tenure. The possession was taken under colour of a legal title; that title being the undoubted right of the Sovereign power to resume and retain or assess to the public revenue all lands within its territories upon the determination of the tenure under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure, or from other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would *primâ facie* be cognizable by the Municipal Courts of India"—*Forester* vs. *The Secretary of State*, 12 B. L. R., 120.

Government confiscated the property belonging to certain rebels, and put it for auction sale to the highest bidder without reserving any right to object to the purchaser. The Government refused to perfect the sale, and, in a suit for specific performance, raised the defence that it was an act of State. Their Lordships of the Privy Council said:—

"It has been said that this suit could not be instituted by the respondent inasmuch as what was done was an act of State which could not be called into question. The meaning, as their Lordships understand it, of an act of State is something which pertains to the functions of Government. Suppose, for instance, any question had arisen with regard to the propriety of confiscating the rebels' property that would have been an act of State. Probably the determination of the Government to sell that confiscated property might also be treated as an act of State; but in the sale the Government was exactly in the situation of an individual selling his property by auction, and when the property was knocked down, the relation of vendor and vendee existed between the Government and the highest bidder—" *Sheo Lall Bohra* vs. *Sheikh Mahomed*, P. C., Dec. 9, 1869. Compare this case with *Nobin Chunder Dey* vs. *The Secretary of State for India*, I. L. R., 1 Cal, 11; there is some difficulty in reconciling them, and the High Court of Madras has declined to follow the latter—*The Secretary of State for India* vs. *Hari Bhanja*, I. L. R., 5 Mad., 273.

And where the East India Company when called upon to be correct for the property of a deceased State prisoner answered that they had dealt with it as sovereigns their answer was set aside—*Essadah Bye* vs. *East India Company*, 1 Tay. and Bell, 290.

A suit will lie against Government to set aside a settlement—*Mahomed Israil* vs. *Wise*, 21 W R., 327; *Krishno Lall Nag* vs. *Bhyrub Chunder Deb*, 22 W. R., 52; but see *Krishna Chandra Sandyal Chowdhry* vs. *Harish Chandra Chowdhry*, 8 B. L. R., 582; to contest an order to pay revenue at an increased rate—*Kebul Ram* vs. *Government*, 5 W. R., 47; for specific performance of a contract of sale—*Rundle* vs. *Secretary of State in Council*, 1 Hyde, 39; for damages on account of wrongful dismissal of a servant—*Hughes* vs. *Secretary of State for India in Council*, 7 B. L. R., 688; or other breach of contract—*Ross Johnson* vs. *Secretary of State*, 2 Hyde, 158; but not for damages arising from a Magistrate taking up a public ferry—*Collector of Patna* vs. *Romanath Tagore*, 7 W. R., 191; nor for a pension—Act XXIII, 1871, section 4.

The action taken by the Revenue authorities under Act IX of 1847 is final, and cannot be questioned; but that does not debar a proprietor from bringing before a Civil Court his right to hold the property at any settlement that may be made—18 W. R., 23, W. R., 38; Reg. App., 268 of 1876—*Narain Chunder Chowdhry* vs. *Tayler*.

Practice.—To question an act of State directly or indirectly the contention should be raised in a suit to which the Government has been made a party—*Nawab Umjad Ally Khan* vs. *Mussamut Mohamdee Begum*, 11 Moore, 550; 10 W. R., 25. Where the lands the subject of the suit are stated to be chowkidaree, or ghatwalee, Government should be made a party—*Collector of Beerbhoom* vs. *Moktakhessee Dabeah*, S D. 4th July 1860. So in a suit to recover possession of a chur which suit had based to defendant, held Government a necessary party—*Cannon* vs. *Bissonath Adhicari*, 5 C. L. R., 154.

Persons authorized to act for Government.

417. Persons being *ex-officio* or otherwise authorised to act for Government in respect of any judicial proceeding, shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of Government.

This section applies to H. C. and M. S. C. C.

Plaints in suits by Secretary of State in Council.

418. In suits by the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of

abode of the plaintiff, it shall be sufficient to insert the words "The Secretary of State for India in Council."

This section applies to H. C. and M. S. C. C. See note under section, 416, *ante*.

Agent of Government to receive process.

419. The Government Pleader in any Court shall be the agent of the Government for the purpose of receiving processes against the said Secretary of State in Council issuing out of such Court.

This section applies to H. C. and M. S. C. C.

Appearance and answer by Secretary of State in Council.

420. The Court, in fixing the day for the said Secretary of State in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channels, and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State in Council or the Government, and may extend the time at its discretion.

This section applies to H. C. and M. S C. C.

Attendance of person able to answer questions relating to suit against Government.

421. The Court may also, in any case in which the Government Pleader is not accompanied by any person on the part of the said Secretary of State in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

This section applies to H. C. and M. S. C. C.

Service on public officers.

422. Where the defendant is a public officer, the Court may send a copy of the summons to the head of the office in which the defendant is employed, for the purpose of being served on him, if it appear to the Court that the summons may be most conveniently so served.

This section applies to H. C. and M. S. C. C.

The Registrar is not a necessary party to a suit under section 79 of the Registration Act III of 1877—*Radhakissen Rowra Dakna* vs. *Chooneelall Dutt*, 5 C. L. R., 172.

Practice.—All suits against an officer in his official capacity should describe him by his official title. If the plaint contains a description not in conformity with the law it should be returned—Cal. Cir. O. No 5, 1875.

If the summons is not sent to the head of the office, it must be served in the usual way. The Government pleader is not the agent of every public officer, as he is of the Government to accept service.

Judicial Officers.—By Act XVIII of 1850, no person acting judicially is liable to be sued in the Civil Courts for any act done or ordered by him to be done, in the discharge of his judicial duty, whether or not within the limits of his jurisdiction ; provided that he at the time in good faith believed himself to have jurisdiction to do or order the Act complained of. No action at all will lie against a judicial officer while acting in the exercise of his jurisdiction—*Prahl.d Maharudra* vs. *Watt*, 10 Bom., 348; but if a Judge has not jurisdiction and has the knowledge, or even if he has the means of knowledge of his want of jurisdiction, he is liable—*Calder* vs. *Halket*, 2 Moore, 293 ; In re *Toy*, 1 Tay. and Bell, 219 ; *Collector of Sea Customs* vs. *Chethambaram*, I. L. R., 1 Mad., 89 unless it appears that he had an honest belief, framed on enquiry and consideration, that he was acting within his powers—*Ragunada Rau* vs. *Nathamuni*

Thuthamayyangar, 6 Mad., 423; *Taraknath Mookhopadhya* vs. *Collector of Hooghly*, 4 B. L. R., 37; *Vinayak Divakar* vs *Bai Itcha*, 3 Bom., 36; *Vithoba Malbari* vs. *Corfield*, 3 Bom. App., 1. This immunity extends not merely in respect of Acts in Court, *sedenti curia*; but in respect of all acts of a judical nature, thus issuing a warrant arrest—*Calder* vs. *Halket*, 2 Moore, 295; adjudicating a penalty under section 24, Act VI of 1863—*Collector of Sea Customs* vs. *Chithambaram*, I. L. R., 1 Mad., 89; postponing a sale in execution—*Meghraj* vs. *Takir Hossein*, I. L. R., 1 Alla., 280, are judical acts. If on the other hand, the act is within his jurisdiction, he is protected absolutely and the question of good faith does not arise—*Meghraj* vs. *Takir Hossein*, I. L. R., 1 Alla,, 280; *Ousley* vs. *Plowden*, 1 Boulnois, 165. Thus where a Judge was sued for words spoken falsely and maliciously, and it appeared that they had been spoken while the Judge was trying a case in which the plaintiff was a party: *Held*, no cause of action, on the ground that no action would lie for words spoken or acts done in his judicial capacity in a Court of Justice—*Scott* vs. *Stansfield*, L. R., 3 Eq., 220; *Ali Kurreem* vs. *Sandys*, 1 Boulnois, 1; *Seaman* vs. *Netherclift*, 1 C. P. D., 540; 2 C. P. D., 39; but this immunity is in respect of the character of Judge, which if a man assume knowing that in fact he is not so, either in respect of the subject-matter or the parties, he has no immunity—*Calder* vs. *Halket*, 2 Moore, 293.

A plaint declaring that a Judge knowingly and maliciously issued an illegal order does not disclose a cause of action. Nor is stating that a Judge acted "maliciously and without authority" sufficient—*Girdharlal Dayadas* vs. *Jaganath Girdharbhai* and *Chota Lal*, 10 Bom., 183. It must not only aver that he had no jurisdiction, but also that he had no reasonable and probable cause for supposing that he had jurisdiction—*Prahlad Maharudra* vs. *Watt*, 10 Bom., 316.

Municipal Commissioners when acting as Magistrates are entitled to the same privileges —*Shajada Halimoozzumah* vs. *Chairman of Hooghly*, 13 W. R., 340. In Bombay such a suit against a municipality can be heard by the District Judge only—*The Ahmedabad Municipality* vs. *Mohamed Jamal*, I. L. R., 3 Alla., 146.

Executive officer.—There is no such general protection granted to executive officers. They are exempted in special cases—Act XVIII, 1850, section 1; Act V, 1861, section 48; and where they are allowed any special protection when acting under any Act, there is no rule of law more firmly established than that if they *bonâ fide* and not absurdly believe that they are acting in pursuance of the statute and according to law, they are entitled to the special protection which the Legislature intended for them although they have done an illegal act—*Spooner* vs. *Juddow*, 4 Moore, 353.

The following rules were laid down in *Ousely* vs. *Plowden*, 1 Boulnois, 165.

1*st*.—If an officer is authorised by law to do the act which he does he is justified in doing it. Whatever his object or intention may be at the time he does it, he is not confined in his defence to the authority which alone he may have produced when he acted, and may resort to any authority which he possessed to justify his proceeding. See however *Gopee* vs. *Mytton*, 17 Tay. 313.

2*nd*.—In cases of breach of contract such as the dismissal of a servant, the master may justify the dismissal upon a ground other than that assigned by him at the time of dismissal provided that at that time the cause existed and was known to him.

On the matters laid down in these rules see—*Trent* vs. *Hunt*, 9 Exch. Rep., 14; *Cowan* vs. *Millbourn*, I. L. R., 2 Exch., 230; *Mothoora Mohun Roy* vs. *The Bank of Bengal*, I. L. R., 3 Cal., 392.

Extension of time to enable officer to make reference to Government.

423. If the public officer on receiving the summons considers it proper to make a reference to the Government before answering to the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel;

and the Court upon such application may extend the time for so long as appears to be requisite.

This section applies to H. C. and M. S. C. C.

This application must be made by the officer on his own behalf. It should not be made in the name of Government.

Notice previous to suing Secretary of State in Council or public officer.

424. No suit shall be instituted against the said Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capa-

city, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff; and the plaint must contain a statement that such notice has been so delivered or left.

This section applies to H. C. and M. S. C. C.

A public officer is entitled to notice only in those cases in which he is sued for damages on account of some wrong inadvertently committed by him in the discharge of his duty—*Shahebzadee Begum* vs. *Fergusson*, I. L. R., 7 Cal., 499; *Chunder Skikur* vs. *Obhoy Churn*, I. L. R., 6 Cal., 8.

It should be in the form of a notice, and not like a mere letter. An attorney's letter declaring that he has been instructed to take legal proceedings is informal—*Lewis* vs. *Smith*, Holt's N. P. C., 27; *Norris* vs. *Smith*, L. R., 2 P. & D., 353; nor is a notice objecting and asking a re-consideration of the order complained of sufficient.—*Abhoynath Bose* vs. *Chairman of Municipal Commissioners of Kishnaghur*, 7 W. R. 92.

The notice must (in the case of a public officer) be served personally, or left at his office. It must state the cause, but not the form of the action—*Sabin* vs. *Deburgh*, 2 Camp., 196; and no other cause of action can be raised at the trial—*Ullman* vs. *The Justices of the Peace for the Town of Calcutta*, 8 B. L. R., 265. The section in short requires that the intending plaintiff should substantially inform the officer of the ground of complaint so as to enable him to see if there is any ground for the action—*Jones* vs. *Bird*, 5 B. & Ald., 837; he should, therefore, set forth sufficiently clear the grounds of the complaint—*Smith & Co.* vs. *West Derby Local Board*, 3 C. P. Div., 423; and the time and place where the act complained of was done—*Breese* vs. *Jerdeon*, 12 L. J. Q. B., 234. Lastly, the notice should give the name and place of abode of the party intending to sue. See on this, *James* vs. *Swift*, 4 B. & C., 681.

The day of serving the notice and that of bringing the action must be both excluded in computing the two months—*Young* vs. *Higgon*, 6 M. & W., 49.

A Collector appointed to manage a minor's estate is a public officer within this section—*Nursing Rai* vs. *Lakshmanead*, I. L. R., 1 Bom., 218; a nazir appointed as guardian *ad litem* of a minor is not—*Mohan Ishuar* vs. *Hakee Rupa*, I. L. R., 4 Bom., 638; *Jadow Mulji* vs. *Chhagan*, I. L. R., 5 Bom., 360.

Arrests in such suits.

425. No warrant of arrest shall be issued in such suit without the consent in writing of the District Judge.

This section applies to H. C. and M. S. C. C.

Application where Government undertakes defence.

426. If the Government undertakes the defence of a suit against a public officer, the Government Pleader, upon being furnished with authority to appear and answer to the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register.

This section applies to H. C. and M. S. C. C.

When Government has undertaken the defence, the Government Pleader in lieu of a vakalutnama, files a memorandum on unstamped paper—Cir. Civ. O., No. 23, Cal., 1871.

This does not change the nature of the suit which will continue as before. The suit is against the officer, and against him, the decree, if any, must be passed.

Procedure where no such application made.

427. If such application is not made by the Government Pleader on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed as in a suit between private parties, except that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

Defendant not liable to arrest before judgment.

This section applies to H. C. and M. S. C. C.

If the application is not made before the day fixed in the notice to appear and answer under section 422, or section 423, no note will be made in the register, and the suit will proceed as a private suit.

Exemption of public officers from personal appearance.

428. In a suit against a public officer in respect of such act as aforesaid, the Court shall exempt the defendant from appearing in person when he satisfies the Court that he cannot absent himself from his duty without detriment to the public service.

This section applies to H. C. and M. S. C. C.

The discretion to compel his attendance or otherwise rests with the Judge.

Procedure where decree is against Government or public officer.

429. When the decree is against the said Secretary of State in Council or against a public officer in respect of such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied ; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

Execution shall not issue on any such decree unless it remains unsatisfied for the period of three months computed from the date of the report.

This section applies to H. C. and M. S. C. C.

Execution shall not issue before three months, and until the period mentioned in the decree has expired.

CHAPTER XXVIII.

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS.

When aliens may sue.

430. Alien enemies residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the Courts of British India as if they were subject of Her Majesty.

No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of Her Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of the second paragraph of this section, be deemed to be an alien enemy residing in a foreign country.

When foreign State may sue.

431. A foreign State may sue in the Courts of British India, provided that—

(*a*) it has been recognized by Her Majesty or the Governor-General in Council, and

(*b*) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.

The Court shall take judicial notice of the fact that a foreign State has not been recognized by Her Majesty or by the Governor-General in Council.

This section applies to H. C. and M. S. C. C.

If the foreign State has been recognized, the recognition is conclusive of the right to sue. A foreign State is limited to objects stated in the text, and cannot sue for anything else; infringing its prerogative right does not constitute a cause of action—*Emperor of Austria* vs. *Day*, 2 Giff., 628.

The State should sue by the name by which it has been recognized by this country. In a monarchy all the public rights and interest of the nation are vested in and represented by the monarch; in a republic, they are the property of the State. Hence in the former case the suit should be entitled "*The Emperor of Austria* vs. *A.*"; or, "*the King of Spain* vs. *B.*"; in the latter, the name of the State must be used, and the plaint should describe the case as "*The United States of America* vs. *A.*"—*United States of America* vs. *Wagner*, L. R., 2 Chan., 582.

Foreign States can only obtain relief subject to the rules of the Court, and pursuant to its rules of practice—and one of the conditions is that like an individual, it will give discovery. Where a foreign State is plaintiff, the defendant should apply to it to name some person from whom discovery may be sought, and if it refuses, the Court will be justified in dealing with the suit as if it were the case of an ordinary individual in which discovery had been refused—*United States of America* vs. *Wagner*, L. R., 2 Chan., 590; *Republic of Peru* vs. *Weguelin*, L. R., 20 Eq., 140.

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.

432. Persons specially appointed by order of Government at the request of any Sovereign Prince or ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

This section applies to H. C. and M. S. C. C.

433. Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of Government certified by the signature of one of its Secretaries (but not without such consent) be sued in any competent Court not subordinate to a District Court;

Suits against Sovereign Princes, &c.

Such consent shall not be given unless—

(*a*) the Prince, Chief, ambassador or envoy has instituted a suit in such Court against the person desiring to sue him; or

(*b*) the Prince, Chief' ambassador or envoy, by himself or another, trades within the local limits of the jurisdiction of such Court; or

(*c*) the subject-matter of the suit is immoveable property situate within the said local limits and in the possession of the Prince, Chief, ambassador or envoy.

Sovereign Princes, &c., exempt from arrest.

No such Prince, Chief, ambassador or envoy shall be arrested under this Code; and no decree shall be executed against the property of any such Prince, Chief, ambassador, or envoy unless with consent of Government certified as aforesaid.

When their property may be attached.

This section applies to H. C. and M. S. C. C.

Compare section 2, Act XIII of 1868, and the case of *Begum Bibee* vs. *The King of Oude*, 11 W. R., 116.

The Rajah of Tipperah is subject to the Courts of British India in respect of the lands held within it, otherwise not, except in the cases mentioned in this section—*Maharaja Bir Chunder Manickya* vs. *Ishan Chunder Thakur*, 3 C. L. R., 417.

434. The Governor-General in Council may from time to time, by notification in the *Gazette of India*,

Execution in British India of decrees of Courts of Native States.

(*a*) declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with Her Majesty, and not established by the authority of the Governor-General in Council, may be executed in British India as if they had been made by the Courts of British India, and

(*b*) cancel any such declaration.

So long as such declaration remains in force, the said decrees may be executed accordingly.

This section applies to H. C. and M. S. C. C.

The judgment of a foreign Court, on a decree obtained in British India, is no bar to the execution of the original decree—*Fakuruddin Mahomed* vs. *Official Trustee*, I. L. R., 7 Cal., 82.

No suit will lie on the judgment of the Court of a Native State. Such judgment can only be enforced in the manner provided by this section—*Bhavanishankar Shervakram* vs. *Pursadi Kalidas*, I. L. R., 6 Bom., 292. See notes on sections 12 and 14, *ante*.

CHAPTER XXIX.

SUITS BY AND AGAINST CORPORATIONS AND COMPANIES.

Subscription and verification of plaint.

435. In suits by a Corporation, or by a Company authorized to sue and be sued in the name of an officer or of a trustee, the plaint may be subscribed and verified on behalf of the Corporation or Company by any director, secretary or other principal officer of the Corporation or Company, who is able to depose to the facts of the case.

This section applies to H. C. and M. S. C. C.

In all suits by or against a Corporation, or any Company authorized to sue and be sued in the name of an officer or trustee, the name of the Corporation or the names of the officers or trustees of the Company shall be inserted in the plaint as plaintiff or defendant, as the case may be. In cases of an unincorporated or unregistered Company, the names of the individuals must be given, if known; if not, the plaintiff should sue the Company by the name under which it carries on business, stating his inability to describe them better—*Koylas Chunder Roy* vs. *Ellis*, 8 W. R., 45

Where the actuary of an Insurance Company established in London by Act of Parliament which gave him the privilege of suing there on behalf of the Company, sued in India it was held though the Act did not extend to this country that he might sue, inasmuch as the insured must be assumed to have notice of the Act under which he could sue and be sued and the contract might be considered as in effect made by him only—*Jones* vs. *Tagore*, Fulton, 388.

As to the remedies against a Corporation, compare *Glossop* vs. *Heston Board*, 12 Ch. Div., 102, and *The Municipal Commissioners of Madras* vs. *Branson*, I. L. R., 3 Mad., 20.

Where a suit is preferred by a Corporation, or registered Company the plaint may be verified by any principal officer having a knowledge of the facts. In a suit against a Corporation, interrogatories may be delivered, with the sanction of the Court to any of its officers—Section 124, *ante*; *Wilson* vs. *Church*, 9 Ch. Div., 552.

Service on Corporation or Company.

436. When the suit is against a Corporation, or against a Company authorized to sue and be sued in the name of an officer or of a trustee, the summons may be served—

(*a*) by leaving it at the registered office (if any) of the Corporation or Company, or

(*b*) by sending it by post in a letter addressed to such officer or trustee at the officer (or if there be more offices than one, at the principal office in British India) of the Corporation or Company, or

(*c*) by giving it to any director, secretary or other principal officer of the Corporation or Company;

and the Court may require the personal appearance of any director, secretary or other principal officer of the Corporation or Company who may be able to answer material questions relating to the suit.

This section applies to H. C. and M. S. C. C.

An executive engineer of a Railway Company is not an officer, within para. (c), on whom service may be made—*Hanlon* vs. *The India Branch Railway Company*, 1 Hyde, 197.

CHAPTER XXX.

SUITS BY AND AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

Representation of beneficiaries in suits concerning property vested in trustees, &c.

437. In all suits concerning property vested in a trustee, executor or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties.

15 and 16 Vict., c. 86, s. 42. Judicature Acts, Order 16, Rule 7. This section applies to H. C. and M. S. C. C.

It seems to apply to cases in which the contention is between the persons beneficially interested on the one hand and a stranger on the other, and not to any contention between the beneficiaries themselves—*Hamond* vs. *Walker*, 3 Jur., N. S., 686.

In England a bare trustee, unless for persons under a disability cannot sustain a petition for adjudication of bankruptcy against the debtor—ex-parte *Colley*, 9 Ch. Div., 307; and in a suit for foreclosure against a trustee, the adult beneficial owner should be made a party—*Mills* vs. *Jennings*, 13 Ch. Div., 639, 649; but a trustee seeking to redeem represents the person beneficially interested—*Mills* vs. *Jennings*, 13 Ch. Div., 639; so in a case for partition—*Simpson* vs. *Denny*, 10 Ch. Div., 28, or for sale and partition—*Stace* vs. *Gaye*, 8 Ch. Div., 451, the trustee is sufficient; see also *Bulley* vs. *Bulley*, 8 Ch. Div., 479, 489.

As to the position of executors to a Hindu, before the Hindu Wills Act see *Lallubhai* vs. *Mankuvarbhai*, I. L. R., 2 Bom., 388.

The parties beneficially interested should always be made parties in the cause when the executors or trustees are wholly uninterested in the matter—*Clegg* vs. *Rowland*, L. R., 3 Eq., 373; or they have from any cause an interest adverse to that of the beneficial owner—*Payne* vs. *Parker*, L. R., 1 Chan. App., 327; and it has been held that the heirs of a Hindu may sue trustees in respect of a breach of a charitable or religious trust though they have no interest in the trust—*Brojo Mohan Dass* vs. *Hurrololl Doss*, 6 C. L. R., 59. As to claims against executors, &c., see section 44, rule *f*, *ante*.

The beneficial owner can sue to get the benefit of a decree obtained by his trustee —*Juggobundho Coondoo* vs. *Nil Comul*, W. R., 1864, p. 190.

In a benamee transaction the person beneficially interested should sue—*Bassunt Coomaree* vs. *Bullab Deb*, Fulton, 383; *Tarini Kant Lahiri* vs. *Krishna Moni*, 5 C. L. R., 179.

As to the sale of deceased's farm for rent due by the executor, see—*Lord Talbot* vs. *Moran*, L. R., 8 Q. B. Div., 307.

Joinder of executors and administrators.

438. When there are several executors or administrators they shall all be made parties to a suit against one or more of them:

Provided that executors who have not proved their testators' will, and executors and administrators beyond the

local limits of the jurisdiction of the Court, need not be made parties.

This section applies to H. C. and M. S. C. C.

The exemption extends only to executors who have not proved their testators' wills, and executors beyond local jurisdiction. If any executor has actually administered he must be made a party, although he has renounced and disclaimed—*Smithby* vs. *Hinton*, 1 Vern., 84.

As to the distinction between the position of an administrator *ad litem*, and a general administrator, in administration suits, see—*Dowdeswell* vs. *Dowdeswell*, 9 Ch. Div., 294.

Husband of married executrix not to join.

439. Unless the Court directs otherwise, the husband of a married administratrix or executrix shall not be a party to a suit by or against her.

This section applies to H. C. and M. S. C. C.

CHAPTER XXXI.

SUITS BY AND AGAINST MINORS AND PERSONS OF UNSOUND MIND.

Minor must sue by next friend.

Costs.

440. Every suit by a minor shall be instituted in his name by an adult person, who in such suit shall be called the next friend of the minor, and may be ordered to pay any costs in the suit as if he were the plaintiff.

Sections 435 to 462 are substantially the Rules of the High Court at Calcutta, 1874. This section applies to H. C. and M. S. C. C.

The appearance of the alleged minor may be taken into consideration in deciding the question of minority—*Khetter Mohun Ghose* vs. *Ramessur*, W. R., 1864, p. 304; but it is not evidence of the high order—*Kalee Haldar* vs. *Sreeram Ghose*, W. R., 1864, p. 366.

A minor is as much bound by a judgment in his own action as if he were of full age—*Modhoo Soodun Singh* vs. *Rajah Prithee Bullub Paul*, 16 W. R., 231. See also *Grish Chunder* vs. *Miller*, 3 C. L. R., 17. As to the course which a minor on attaining his majority should adopt to get rid of a judgment prejudicial to his interests, see—*Dabee Dutt Shahoo* vs. *Subodra Bibee*, 25 W. R., 449.

In a suit upon a mortgage, given by a Hindu governed by mitakshara law, sons born since the date of the mortgage are not necessary parties—*Doollee Chand* vs. *Wooma Sunkur Pershad*, 7 C. L. R., 429; but see—*Luchman Doss* vs. *Gridhur Chowdhry*, 6 C. L. R., 429.

Until a person has been adjudged a lunatic he may appear in a suit either by person or by Vakil—*Woomasundari Dasi* vs. *Ramji Haldar*, 9 C. L. R., 13; I. L. R., 7 Cal., 242; in England in Chancery the practice is to sue by a next friend—*Jones* vs. *Lloyd*, L. R., 18 Eq., 265, see also ex-parte *Cahen*, 10 Ch. Div., 183.

Next friend.—A minor cannot sue alone—*Noor Ahmed* vs. *Lulta Pershad*, 2 Alla., 189; but by his next friend, who is a species of attorney whose duty it is to prosecute the minor's right—*Bama Soondery Debia* vs. *Grish Chunder Banerjee*, 3 W. R., Act X, 138; and such a suit may be carried on in *forma pauperis*—*Misser* vs. *Mutty Lal*, Fulton, 490. But if the suit has been commenced, and defendant appears and makes no objection the irregularity cannot be raised after judgment—In re *Brocklebank*, 6 Ch. D., 358. The plaint should describe the minor plaintiff as "A B, a minor, inhabitant of X, by his next friend C D, inhabitant of Y, sues E F, &c., and the minor defendant sues A B, a minor, of whom C D, inhabitant of Y, is next friend." See also *Mongula Dossee* vs. *Sharoda Dossee*, 20 W. R., 48.

A person cannot be made next friend of a plaintiff without his express consent—section 32, *ante*; *Uma Sundari Dasi* vs. *Ramji Haldar*, I. L. R., 7 Cal., 242. He is not a party to the suit, and his duty ends with final judgment. The object of his appointment being to have some person before the Court liable for costs, he incurs no greater responsibility. No decree can be given against him personally—*Brojo Mohun Mojumdar* vs. *Roodronath Surmah Mojoomdar*, 15 W. R., 192; nor can he execute a decree after the minor's decease—*Holodhur Roy Chowdhry* vs. *Judoonath Mookerjee*, 14 W. R., 62.

By section 3, Act XL of 1858, no person in Bengal is entitled to institute or defend any suit connected with the estate of a minor, unless he has obtained a certificate under the Act, or the leave of the Court in which the suit is pending. But the next friend is entitled to sue for partition in the minor's name without permission where the minor is a member of a joint mataksharа-family and Act XL of 1858 does not apply—*Mussamut Gourrh Kooer* vs. *Gungadhur Pershad*, 4 C. L. R., 398; I. L. R., 5 Cal., 219; see however *Doorga Pershad* vs. *Kesho*, L. R., 9 Ind. App., 27. A similar Act, Act XX of 1864, is in force in Bombay. And it has been held that a widow suing to have charge of property in trust for her minor, of greater value than Rs. 250, cannot sue as next friend without getting a certificate under section 2, Act XX of 1864—*Murlidhur* vs. *Supdu*, I. L. R., 3 Bom., 149. A foreign certificate of guardianship is not sufficient—*Maganbhai Pursholamdas* vs. *Vithoba*, 7 Bom., 7; and without a proper certificate the Courts may refuse to hear even a natural guardian—*Lalla Boodhmul* vs. *Lalla Gowree Sunker*, 4 W. R., 71; *Madho Rao Apa* vs. *Thakoor Pershad*, 3 Agra, 827; but the Court has a discretion, and may allow any person to appear as next friend of the minor without a certificate—*Sreemunt Koondoo* vs. *Sharoda Soonduree Dassee*, 8 W. R., 197; *Mussamut Munna Jhunna Koonwur* vs. *Laljee Ray*, 1 W. R., 121; and apparently after the institution of the suit—*Kingsman* vs. *Kingsman*, 6 Q. B. Div., 122; but the permission should be formally recorded as it is an act of judicial discretion open to appeal—*Mrinamoyi Dabia* vs. *Jogodeshurie Debi*, 11 I. L. R., 5 Cal., 450; 5 C. L. R., 361; See however *Pirtki Singh*, vs. *Sobhan Singh*, I. L. R., 4 Alla., 1; *Aukhil Chunder* vs. *Tripoora Soondures*, 22 W. R., 525. In no case should money decreed be paid to the next friend unless he has obtained a certificate under Act XL of 1858—*Khajah Mahomed Khan* vs. *Mahomed Rajendra Kishore*. 2 Sev. 847.

Where the defendant contended that the suit could not be carried on without a guardian because the plaintiff was a minor, and the plaintiff failed to prove his majority, and the suit was dismissed: *Held*, that the Court should have appointed a next friend—*Moorlee Dhur* vs. *Nathoonee Mahtoon*, 25 W. R., 184.

The practice of suing by a next friend is not generally known to the people, and even the decisions of the highest Courts have not been uniform. It has been held that where a mother sued for the property of her minor son, in her own name, not even saying she was guardian, and the first Court allowed the suit, but did not expressly sanction it, that the Court in appeal could not reverse the decision on the ground that it was not properly laid. Such an objection was considered "as in no way affecting the merits of the case"—*Goonoo Monee Debia* vs. *Ram Kumol Sandle*, 17 W. R., 144: although the minor and his property would be bound by the decision—*Bonomallee Kesh* vs. *Hungshessur Roy*, 17 W. R., 492; and he would be liable to arrest—*Sherafutoollah Chowdhry* vs. *Sreemutty Adbedoonissa Bibee*, 17 W. R., 374; and he could not be heard on the ground of non-representation by the Court executing the decree; but must apply for review or file a regular suit to procure an injunction, restraining execution—*Nawab Mahomed Nooroollah Khan* vs. *Har Charan Rai*, 6 Alla., 98. Looking at the grave consequences that may ensue to a minor, I think the Court should follow the stricter rule and set aside a judgment, even in special appeal if not properly laid against the minor—*Shaim Soonder* vs. *Narain Doss*, 2 Agra, 343; *Mussamut Dhunraj* vs. *Rajah Roodur Pertab Singh*, 3 Agra, 300; N. W., 4 Civ. Let., 1861; and in the form prescribed in this Act—*Babaje* vs. *Maruti*, 11 Bom., 182; *Joyram Lall Mahtoon* vs. *Stewart*, 20 W. R., 453; and that a decree passed under other circumstances would not bind him—*Mrinamoyi Dabia* vs. *Jogodeshurri Dabia*, I. L. R., 5 Cal., 450; 5 C. L. R., 361; *Issur Chunder Gupto* vs. *Nobo Kristo Gupto*, 7 C. L. R., 407; and this is the view held by the members of the judicial committee of the Privy Council who have decided that a suit against a father in his own right and as guardian of his minor son is not a suit against the minor—*Sree Narain Mitter* vs. *Sreemutty Kishen Soondery*, 11 B. L. R., (P. C.) 171, 191; and that the manager of an estate is not the guardian of an infant co-proprietor so as to bind him by a decree—*Doorga Persad* vs. *Kesho Persad*, L. R., 9 Ind. App., 27; and the purchaser with notice would be compelled to deliver up possession—*Junges Lal* vs. *Sham Lall Misser*, 20 W. R., 120; although no fraud had been committed—*Mussamut Kooshalo* vs. *Sub Sookh*, 1 Agra, 175; and that great care should be taken in allowing the property of minors to be sold in execution—*Shaikh Abdool Kureem* vs. *Syud Jaun Ali*, 18 W. R., 56.

Costs.—When a next friend retains an attorney to act for the infant, no contract is created between the attorney and the infant upon which the attorney can sue the infant for costs—*Radhanath Bose* vs. *Lalloprosunno Ghose*, 2 Ind. Jur., N. S., 269; and see *Steed* vs. *Pierce*, L. R., 18, Eq. 192; see however *Watkins* vs. *Dhunno Baboo*, I. L. R., 7 Cal., 140.

The next friend may be ordered to pay costs, and if so he cannot levy them from the minor's estate—*The Collector of Mymensing* vs. *Kali Chunder Chowdhry*, S. D. 1st of Sept. 1860; but this is not done unless he has instituted a useless suit without due consideration—*Kenrick* vs. *Wood*, L. R., 9 Eq., 333; or it is proved that the plaintiff is not a minor—*Palmer* vs. *Walesby*, L. R., 3 Chan. Ap. 732; and whenever it is possible the Courts will allow

his costs out of the infant's estate for any proceeding instituted for the infant's benefit, although unsuccessful, provided he appears to have acted *bonâ fide*—*Staines* vs. *Maddox*, Mosl., 319 ; *Cross* vs. *Cross*, 8 Beav., 455 ; and where a guardian is personally held liable for costs it should be stated in the decree or order of Court ; since ordinarily he is only liable in his representative capacity—*Komul Chunder Sein* vs. *Surbessur Doss Goopto*, 21 W. R., 298 ; *Omrao Singh* vs. *Prem Narain Singh*, 24 W. R., 264.

Where an action was commenced in the name of a married woman by her next friend who when challenged could not produce his authority : *Held*, that the action should be dismissed with costs to be paid by the solicitors of the next friend—*Schjott* vs. *Schjott*, 19 Ch. Div., 94.

Limitation.—A suit by a next friend on behalf of a minor is governed by the law of limitation applicable to the minor—*Khodabux* vs. *Badree Narain Singh*, I. L. R., 7 Cal., 137.

Court of Wards—See Act IX of 1879 (B.C.) A female ward cannot give up her rights in favour of the next heir without the sanction of the Court—*Government* vs. *Monehur Deo*, W. R., Sup. No. 39 ; nor can she bind the estate by debt or mortgage—*Rai Bal Krishna* vs. *Masuma Bibi*, P. C. July 6th 1882.

Where a suit was brought by the "Court of Wards on behalf of the minor Ram Chunder Deo Dhulub Deb," and the officer who had caused it to be instituted had left the country, it was held that the suit was wrongly brought, and that no costs could be given against the Court of Wards, or the minor in person, and the defendants were made to pay the costs as they were to blame for allowing it to proceed in an irregular way—*Rajah Bikromajeet Mullo Ogalsundo Deb* vs. *Court of Wards*, 21 W. R., 312.

Application to be made by next friend or guardian *ad litem*.

441. Every application to the Court on behalf of a minor (other than an application under section 449) shall be made by his next friend, or his guardian for the suit.

This section applies to H. C. and M. S. C. C.

Plaint filed without next friend to be taken off file.

Costs.

442. If a plaint be filed by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file with costs to be paid by the pleader or other person by whom it was presented. Notice of such application shall be given to such person by the defendant ; and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit.

This section applies to H. C. and M. S. C. C.

Taken off the file.—See *Chinniah* vs. *Baubun Saib*, 5 Mad., 435 ; *Radha Kristo Surma* vs. *Ram Chunder Doss*, 11 W. R., 300.

The person presenting the plaint is liable for costs when a plaint is filed by a minor without a next friend.

This and the following sections, down to section 464, do not apply to a minor for whose person or property a guardian or manager has been appointed by the Court of Wards or the Civil Court under any local law—(section 464, *post*—)

Guardian *ad litem* to be appointed by Court.

443. Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.

A guardian for the suit is not a guardian of person or property within the meaning of the Indian Majority Act, 1875, section 3.

The section applies to H. C. and M. S. C. C.

A suit against a father in his own right and as guardian of his minor son is not a suit against the minor—*Sreenaraian Mitter* vs. *Sreemutty Kishen*, 11 B. L. R., 171, 191.

The manager of an estate is not the guardian of an infant co-proprietor of that estate for the purpose of defending a suit unless he has obtained a certificate under Act XL of 1858—*Dorga Pershad* vs. *Kesho Pershad*, L. R., 9 Ind. App., 27.

A guardian *ad litem* should always be appointed by the Court—5 Mad. App. viii; otherwise the minor's name should be struck out of the record—*Radha Kristo Surma* vs. *Ram Chunder Doss*, 11 W. R., 361: but see, in re *Brocklebank*, 6 Ch. D., 358; the guardian may be a different person from the natural guardian—*Mussamut Etwaree* vs. *Ram Narain Ram*, 13 W. R., 231.

A suit may be brought before a guardian is appointed, and limitation counts from the date of the plaint and not from the appointment of the guardian—*Khem Kharak* vs. *Har Dayal*, I. L. R., 4 Alla., 37; but the plaintiff should make early application to have a guardian appointed, and then the Judge should appoint a guardian—In re *Motiram Rupchand*, 11 Bom., 21; but no order of appointment should issue without the consent of the party appointed, and if no relative or friend of the minor can be found willing to take out a certificate under the Minors' Act, and appear as guardian, the Judge should appoint an officer of Court or some respectable nominee of the minor—*Babaji* vs. *Maruti*, 11 Bom., 185; *Dhondiba* vs. *Kusa*, 6 Bom., 219; *Issur Chunder Gupto* vs. *Nobo Kristo Gupto*, 7 C. L. R., 407; *Jadu Mulji* vs. *Wanmali Hurjivan*, I. L. R., 5 Bom., 306; *Woolf* vs. *Pemberton*, 6 Ch. D., 19; for it is the duty of the Court to see that a minor's interests are properly represented—*Nursinghmoyee Gooptia* vs. *Peary Soondree*, 2 Sev., 699; and if an officer of Court be appointed he should not be paid for his trouble—*Kerakoose* vs. *Serle*, 3 Moore, 329. As to appointing a *Nazir* guardian *ad litem*, see *Mohan Ishwar* vs. *Haku Rupa*, I. L. R., 4 Bom., 638.

In a suit against A for himself and as guardian of B, a decree was given against both. Subsequently C petitioned stating that she and not A was the guardian, and asked that the decree might be set aside as regards B. This was refused and C appealed, and the appellate Court set aside the decree against B, although the respondent asked that C should be appointed next friend and the suit remanded. *Held*, that the Judge should have acceded to the respondent's request—*Sheoburrut Singh* vs. *Lalljee Chowdhry*, 13 W. R., 202.

The order should run as follows on application made on behalf of the minor under section 456:—

On defendant's application—"Let A be assigned guardian of the infant B, by whom he may defend this action."

On plaintiff's application—"Upon motion, &c., who alleged that the defendant C D is a minor and has been duly served with summons and has not appeared, although the time for doing so expired upon the——and upon reading an affidavit of——and affidavit of notice to A, the person with whom the defendant C D was living at the time of service [if infant not residing with father or guardian] and to the father (or guardian) of the minor, Let E be assigned guardian to the said defendant C by whom he may defend this action"—*Pemberton*, 112. As to who may be appointed a guardian, see sections 456, 457, *post*.

Order obtained without next friend or guardian may be discharged.

Costs.

444. Every order made in a suit or on any application before the Court, in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, if the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

This section applies to H.C. and M. S. C. C.

445. Any person being of sound mind and full age may act as next friend of a minor, provided his interest is not adverse to that of such minor, and he is not a defendant in the suit.

Who may be next friend.

This section applies to H. C. and M. S. C. C.

446. If the interest of the next friend of a minor is adverse to that of such minor, or if he is so connected with a defendant whose interest is adverse to that of the minor, as to make it unlikely that the minor's interest will be properly protected by him, or if he does not do his duty, or, pending the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court (if satisfied of the sufficiency of the cause assigned) may order the next friend to be removed accordingly.

Removal of next friend.

This section applies to H. C. and M. S. C. C.

447. Unless otherwise ordered by the Court, a next friend shall not retire at his own request without first procuring a fit person to be put in his place, and giving security for the costs already incurred.

Retirment of next friend.

The application for the appointment of a new next friend shall be supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor.

Application for appointment of new next friend.

This section applies to H. C. and M. S. C. C.

An application to substitute a next friend must be made with notice to the defendants; such is the English procedure.

An affidavit is necessary, although the application is not opposed by the defendants—*Harrison* vs. *Harrison*, 5 Beav., 31.

448. On the death or removal of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Stay of proceedings on death or removal of next friend.

This section applies to H. C. and M. S. C. C.

On the death or removal of a next friend, it is the duty of the solicitor or pleader for the plaintiff to apply to the Court for an order, appointing a new next friend in his stead—*Westby* vs. *Westby*, 2 Coop. *temp.*, Cott., 211.

In England when a next friend dies the paternal relations of the minor are first consulted as regards his successor—*Talbot* vs. *Talbot*, L. R., 17 Eq., 347; *Woolf* vs. *Pemberton*, 6 Chan. D., 19. No affidavit of fitness is apparently required under this section.

No person can be appointed next friend without his consent, and before making such an appointment the Judge should be satisfied of his willingness to act. In England his written authority must be produced and filed.

449. If the pleader of such minor omits, within reasonable time, to take steps to get a new next friend appointed, any person inter-

Application for appointment of new next friend.

ested in the minor or the matter at issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

This section applies to H. C. and M. S. C. C.

If a next friend be not appointed and the suit is dismissed, defendant cannot get his costs from the minor—*Turner* vs. *Turner*, 1 Stra., 708.

Course to be followed by minor plaintiff or applicant on coming of age.

450. A minor plaintiff, or a minor not a party to a suit on whose behalf an application is pending, on coming of age must elect whether he will proceed with the suit or application.

This section applies to H. C. and M. S. C. C.

Where he elects to proceed.

451. If he elects to proceed with it, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.

The title of the suit or application shall in such case be corrected so as to read thenceforth thus:

"*A. B.*, late a minor, by *C. D.*, his next friend, but now of full age."

This section applies to H. C. and M. S. C. C.

Where he elects to abandon

452. If he elects to abandon the suit or application, he shall, if a sole plaintiff, or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or respondent, or which may have been paid by his next friend.

Costs.

This section applies to H. C. and M. S. C. C.

If he abandons it as unreasonable or improper—see section 455.

Making and proving applications under sections 451, 452,

453. An application under section 451 or section 452 may be made *ex-parte;* and it must be proved by affidavit that the late minor has attained his full age.

This section applies to H. C. and M. S. C. C.

When minor co-plaintiff coming of age desires to repudiate suit.

454. A minor co-plaintiff on coming of age, and desiring to repudiate the suit must apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Costs.

Notice of the application shall be served on the next friend, as well as on the defendant; and it must be proved by affidavit that the late minor has attained his full age. The costs of all parties of

such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

If the late minor be a necessary party to the suit, the Court may direct him to be made a defendant.

This section applies to H. C. and M. S. C. C.

If a minor, sole plaintiff, elects to abandon the suit, his application must be to dismiss the suit; if he desires as co-plaintiff to repudiate it, the form of his application must be not to dismiss the suit, but to have his name struck out as co-plaintiff.

In England if the next friend requires it, the late minor will be made a co-defendant—*Bicknell* vs. *Bicknell*, 32 Beav., 381.

When suit unreasonable or improper.

455. If any minor on attaining majority can prove to the satisfaction of the Court that a suit instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed.

Costs.

Notice of the application shall be served on all the parties concerned: and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application, and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit.

This section applies to H. C. and M. S. C. C.

A minor on attaining his majority cannot get a bill filed on his behalf dismissed with costs to be paid by his next friend, unless he can prove to the satisfaction of the Court that the suit was unreasonable or improper, otherwise he must pay all costs—*Anon*, 4 Mad., 461. A filed a bill as next friend of B, whom he alleged to be of unsound mind. B's sanity was established. *Held*, on application by B, to have the bill taken off the file, that he was entitled to an indemnity against all the consequences of the suit having been instituted in his name, and that A must pay B's costs, as between solicitor and client, of the application, and the defendant's costs of the suit, as between party and party, including the costs of the application in the lowest Court and on appeal—*Palmer* vs. *Walesby*, L.R., 3 Ch. Ap., 732.

Petition for appointment of guardian *ad litem*.

456. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. Such application must be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor, and that he is a fit person to be so appointed.

Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian: Provided that he has no interest adverse to that of the minor.

This section applies to H. C. and M. S. C. C.

See section 443.

Apparently an affidavit is necessary, although the plaintiff does not oppose the application. See note under section 447.

The natural guardian should not be passed over when he has no adverse interest and there is no personal imputation against him. A person nominated by certain executors commenced an administration suit against them as next friend of certain infant children. The father of the infant did not become aware that his children were plaintiffs until the decree had been passed, and then applied to be substituted as next friend. *Held*, that as he had no interest adverse to the minors was otherwise eligible, his name should be substituted—*Woolf* vs. *Pemberton*, 6 Ch. D., 19.

A person cannot be appointed guardian *ad litem* against his will—*Tadow Mulji* vs. *Chhagan Raichand*, I. L. R., 5 Bom., 306.

Who may be guardian *ad litem*.

457. A co-defendant of sound mind and of full age may be appointed guardian for the suit, if he has no interest adverse to that of the minor; but neither a plaintiff nor a married woman can be so appointed.

This section applies to H. C. and M. S. C. C.

Under the old Procedure a woman might be appointed—In the matter of *Danapa* bin *Sobrao*, 1 Bom., 134; possibly a widow is still eligible.

Guardian neglecting his duty may be removed.

Costs.

458. If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court may remove him, and may order him to pay such costs as may have been occasioned to any party by his breach of duty.

This section applies to H. C. and M. S. C. C.

Costs cannot be recovered from a person appointed without his previous consent—*Jadow Mulji* vs. *Chhagan Rai Chand*, I. L. R., 5 Bom., 3 Did.

Appointment in place of guardian dying *pendente lite*.

459. If the guardian for the suit dies pending such suit, or is removed by the Court, the Court shall appoint a new guardian in his place.

This section applies to H. C. and M. S. C. C.

Ordinarily, when the next friend of an infant dies, his nearest paternal relations are entitled to nominate the new next friend—*Talbot* vs. *Talbot*, L. R., 17 Eq., 347; *Woolf* vs. *Pemberton*, 6 Ch. D., 19.

Guardian *ad litem* of minor representative of deceased judgment-debtor.

460. When the enforcement of a decree is applied for against the heir or representative, being a minor, of a deceased party, a guardian for the suit of such minor shall be appointed by the Court, and the decree-holder shall serve on such guardian notice of such application.

This section applies to H. C. and M. S. C. C.

Before decree, next friend or guardian *ad litem* not to receive money without leave of Court and giving security.

461. No sum of money or other thing shall be received or taken by a next friend or guardian for the suit on behalf of a minor, at any time before decree or order, unless he has first obtained the leave of the Court, and given security to its satisfaction that such money or other thing shall be duly accounted for to, and held for the benefit of, such minor.

This section applies to H. C. and M. S. C. C.

The duty of a next friend or guardian for the suit is to control the receiver and see that the moneys are properly applied, and he cannot be allowed to hold an appointment incompatible with his relation to the minor—See *Garland* vs. *Garland*, 2 Ves., 137.

Next friend or guardian *ad litem* not to compromise without leave of Court.

462. No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian.

Compromise without leave voidable.

Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor.

This section applies to H. C. and M. S. C. C.

See *Ranee Roushan Jehan* vs. *Syed Enayet Hossein*, W. R., 1864, p. 83.

The sanction must be express not implied—*Raja Gopal* vs. *Muttu Palem*, I. L. R., 3 Mad., 103; and if it is given under a misrepresentation of a material fact, due either to fraud or culpable and wilful ignorance, it is not binding—*Bibee Solomon* vs. *Abdool Azeez*, I. L. R., 6 Cal., 687.

If the guardian cannot do anything for the minor's benefit, he ought to leave the matter to the Court—*Court of Wards* vs. *Rajcoomar Deo Nundun Singh*, 16 W. R., 143. Parties entering into a compromise with a next friend should carry it out by proper deeds filed in Court, and instead of concealing the transactions should obtain the consent of the Court; otherwise they must in order to clear themselves shew that the money was paid to the minor or reached him when he came of age—*Moulvie Abdool Ali* vs. *Mozuffer Hossein Chowdhry*, 16 W. R., P. C., 22.

A Court should not make a decree by consent against a minor without ascertaining that it is for the benefit of the infant that such a decree should be pronounced—*Ramchurn Raha Bukshee* vs. *Mungul Sircar*, 16 W. R., 232; and if the suit is for immoveable property, and the next friend is a person holding a certificate under Act XL of 1858, the consent of the Court granting the certificate is also necessary—*Sheonundun Singh* vs. *Mussamut Kahsa Kooer*, 6 Alla., 179.

A minor can sue by his next friend to set aside a compromise—*Bibee Solomon* vs. *Abdool Azeez*, I. L. R., 6 Cal., 687, or he may on majority proceed by review or a regular suit, making his next friend or guardian a co-defendant—*Dabee Dutt Shahoo* vs. *Subodra Bibee*, 25 W. R., 449.

Application of sections 440 to 462 to persons of unsound mind.

463. The provisions contained in sections 440 to 462 (both inclusive) shall, *mutatis mutandis*, apply in the case of persons of unsound mind, adjudged to be so under Act No. XXXV of 1858, or under any other law for the time being in force.

This section applies to H. C. and M. S. C. C.

A person alleged to be a lunatic, though not found so under Act XXV of 1858, may appear either in person or by vakil—*Uma Sundari Dasi* vs. *Ramji Haldar*, I. L. R., 7 Cal., 242; and see ex-parte *Cahen*, 10 Ch. Div., 183. See however *Guddlidhur Mundul* vs. *Koonj Behari Chand*, 2 Sev., 890; *Brindabun Chunder Kur* vs. *Kali Doss Sircar*, W. R., 1864, p. 268; *Jones* vs. *Lloyd*, L. R., 18 Eq., 265; *Bhoopendra Narain Roy* vs. *Greesh Narain Roy*, I. L. R., 6 Cal., 539.

Wards of Court.

464. Nothing in sections 442 to 462 applies to any minor or person of unsound mind, for whose person or property a guardian or manager has been appointed by the Court of Wards or by the Civil Court under any local law.

This section applies to H. C. and M. S. C. C.

CHAPTER XXXII.

SUITS BY AND AGAINST MILITARY MEN.

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

465. When any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

The authority shall be in writing and shall be signed by the officer or soldier in the presence of (*a*) his commanding officer, or the next subordinate officer, if the party be himself the commanding officer, or (*b*) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority which shall be filed in Court.

When so filed, the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this chapter the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, detachment or depôt to which the officer or soldier belongs.

This section applies to H. C. and M. S. C. C.

A Court of Small Causes has no jurisdiction to try an action brought against a military officer where a Court of Requests has been established—*Aboo Sait* vs. *Arnott*, 2 Mad., 439; or for any personal action at any place where a body of Her Majesty's Forces may be serving—*Hossein Khitmudgar* vs. *Dickinson*, 2 B. L. R., S. N., iv.

A native camp follower attached to a European regiment is amenable under the Mutiny Act and not to any Civil Court—*Musseroodeen* vs. *Khoda Bux*, 10 W. R., 386; but a non-Commissioned Officer or Soldier in Civil employ and out-side Cantonments is subject to the ordinary tribunals—*Cohen* vs. *McCarthy*, 14 W. R., 231.

The written authority must be filed in the suit; and where the objection was taken in regular and special appeal, it was held the defect could not be cured and suit was dismissed—*Sheoram Vithal* vs. *Bhagirathebhai*, 6 Bom., 20.

Person so authorized may act personally or appoint pleader

466. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

This section applies to H. C. and M. S. C. C.

467. Processes served upon any person authorized by an officer or a soldier, as in section 465, or upon any pleader appointed as aforesaid by such persons to act for, or on behalf of, such officer or soldier, shall be as effectual as if they had been served on the party in person or on his pleader.

Service on person so authorized, or on his pleader, to be good service.

This section applies to H. C. and M. S. C. C.

468. When an officer or a soldier is a defendant, the Court shall send a copy of the summons to his commanding officer for the purpose of being served on him.

Service on officers and soldiers

The officer to whom such copy is sent, after causing it to be served on the person to whom it is addressed, if practicable, shall return it to the Court with the written acknowledgment of such person endorsed thereon.

If from any cause the copy cannot be so served, it shall be returned to the Court by which it was sent, with information of the cause which has prevented the service.

This section applies to H. C. and M. S. C. C.

A copy of a summons was sent to Secunderabad by post to the commanding officer where the defendant was stationed, and it was returned with the defendant's acknowledgment endorsed on it and with a certificate that it had been duly served, but there was no affidavit of service: *Held*, that service was sufficiently proved—*Harrison* vs. *Hope*, 11 B. L. R. App., 43.

469. If, in the execution of a decree, a warrant of arrest or other process is to be executed within the limits of a cantonment, garrison, military station or military bazar, the officer charged with the execution of such warrant or other process shall deliver the same to the commanding officer.

Execution of warrant of arrest in cantonments, &c.

The commanding officer shall back the warrant or other process with his signature, and, in the case of a warrant of arrest, if the person named therein is within the limits of his command, shall cause him to be arrested and delivered to the officer so charged.

This section applies to H. C. and M. S. C. C.

The civil pay of a non-Commissioned Officer in civil employ can be made available in execution—*Cohen* vs. *McCarthy*, 14 W. R., 441.

CHAPTER XXXIII.

INTERPLEADER.

470. When two or more persons claim adversely to one another the same payment or property from another person, whose only interest

When interpleader-suit may be instituted.

therein is that of a mere stakeholder and who is ready to render it to the right owner, such stakeholder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property should be made or delivered, and of obtaining indemnity for himself:

Provided that if any suit is pending in which the rights of all parties can properly be decided, the stakeholder shall not institute a suit of interpleader.

This section applies to H. C. and M. S. C. C.

A right of lien is not an interest in the property—*Attenborough* vs. *St. Katharine's Dock*, 3 C. P. Div., 450.

An interpleader-suit may be instituted when two or more persons advance claims *bonâ fide*—Re *New Hamburg Brazilian Railway*, W. N., 1875, p., 239; if their claims refer to the same property and to the same extent—*Hoggart* vs. *Cults*, Cr. & P., 197, (though this case has been disapproved of in India—*The Secretary of State* vs. *Meer Mohammud Hossein*, 1 Mad., 361; see also *Attenborough* vs. *St. Katharine's Dock Company*, 3 C. P. Div., 450) against a person in possession—*Burnett* vs. *Anderson*, 1 Mer., 405, who claims no interest himself, but is merely a stakeholder—*Prudential Assurance Co.* vs. *Thomas*, 3 L. R. Ch., 74; so that no question can arise between him and the claimants—*Bignold* vs. *Audand*, 11 Sm., 23; and who is ready to deliver it to the right owner, whether their titles have had a common origin or are independent of each other—*Tanner* vs. *The European Bank*, 1 L. R., Ex., 261; or their claims have or have not a substantial foundation—*E. & W. India Dock Co.* vs. *Littledale*, 7 Ha., 59. It is not necessary that the stakeholder should have been sued—Re *New Hamburg and Brazilian Railway*, W. N., 1876, p. 239; and when a suit has been brought against a person before instituting the interpleader-suit, he should endeavour to have the other claimants made parties under section 32, *ante*, so as to have the whole question disposed of in the one suit. But see *Mahomed Badshah* vs. *Nicol*, I. L. R., 4 Cal., 355; *Naraini Kuar* vs. *Durjan Kuar*, I. L. R., 2 Alla., 738.

In execution of a decree against B, the bailiff A seized certain goods which were released on C paying, under protest, the sum mentioned in the warrant. A paid the money into the warrant office. *Held*, C's remedy was not by interpleading, but suing for money had and received—*Cohen* vs. *Mullick*, 1 Gaspar, 139.

Plaint in such suit.

471. In every suit of interpleader the plaint must in addition to the other statements necessary for plaints, state—

(*a*) that the plaintiff has no interest in the thing claimed otherwise than as a mere stakeholder;

(*b*) the claims made by the defendants severally; and

(*c*) that there is no collusion between the plaintiff and any of the defendants.

This section applies to H. C. and M. S. C. C.

No suit will lie if the plaintiff claims an interest in the property—*Mitchell* vs. *Hayne*, 2 S. & S., 63; or disputes the amount—*Heplock* vs. *Hammond*, 2 Sm. & G., 141; or has handed over the property to one claimant on an indemnity—*Burnett* vs. *Anderson*, 1 Mer., 405. The plaintiff must also, if possible, bring the subject of the contention into Court before any order can be passed. See next section.

Payment of thing claimed into Court.

472. When the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit.

This section applies to H. C. and M. S. C. C.

473. At the first hearing the Court may—

Procedure at first hearing.

(*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit;

or, if it thinks that justice or convenience so require,

(*b*) retain all parties until the final disposal of the suit;

and, if it finds that the admissions of the parties or other evidence enable it,

(*c*) adjudicate the title to the thing claimed: or else it may

(*d*) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims.

This section applies to H. C. and M. S. C. C.

The plaintiff is, as a rule, entitled to be paid at once his costs out of the fund in Court—*Glynn* vs. *Locke*, 3 D. & War., 11, 24; or to a charge upon it—(section 475); and the losing defendant must make good the amount—*Laing* vs. *Zeden*, L. R., 9 Ch. Ap., 738.

474. Nothing in this chapter shall be taken to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

When agents and tenants may institute interpleader-suits.

Illustrations.

(*a*) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(*b*) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterward alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-suit against A and C.

This section applies to H. C and M. S. C. C.

An agent or tenant cannot ordinarily dispute the title of his principal or landlord, and hence he is not allowed to institute an interpleader-suit. But if a landlord has created a subsequent intermediate tenure, or the agent is not certain who his principal is, a suit will lie—*Clarke* vs. *Byne*, 13 Ves., 383; *Suart* vs. *Welch*, 4 My. & C., 305.

475. When the suit is properly instituted, the Court may provide for the plaintiff's costs by giving him a charge on the thing claimed or in some other effectual way.

Charge of plaintiff's costs.

This section applies to H. C. and M. S. C. C.

Procedure where defendant is suing stakeholder.

476. If any of the defendants in an interpleader-suit is actually suing the stakeholder in respect of the subject of such suit, the Court in which the suit against the stakeholder is pending shall, on being duly informed by the Court which passed the decree in the interpleader-suit in favour of the stakeholder, that such decree has been passed, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

Costs.

This section is new. It applies to H. C. and M. S. C. C.

Under the 30 and 31 Vic., c. 142, s. 31, the Judge has power to adjudicate in an interpleader-suit upon any special damages to which the claimant of the goods seized may be entitled, arising out of the execution, and no separate suit will lie—*Death* vs. *Harison*, 6 L. R. Ex., 15. This is not the law in India; see *Walmrey* vs. *Cartner*, 1 Gaspar, 170.

PART IV.

PROVISIONAL REMEDIES.

CHAPTER XXXIV.

OF ARREST AND ATTACHMENT BEFORE JUDGMENT.

A.—Arrest before Judgment.

When plaintiff may apply that security be taken

477. If at any stage of any suit, other than a suit for the possession of immoveable property, the plaintiff satisfies the Court by affidavit or otherwise—

that the defendant, with intent to avoid or delay the plaintiff, or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him,

(*a*) has absconded or left the jurisdiction of the Court, or

(*b*) is about to abscond or to leave the jurisdiction of the Court, or

(*c*) has disposed of or removed from the jurisdiction of the Court his property or any part thereof, or

that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff

will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the plaintiff may apply to the Court that security be taken for the appearance of the defendant to answer any decree that may be passed against him in the suit.

This section applies to H. C. and M. S. C. C.

A creditor is not entitled merely because he has a great demand against his debtor to arrest him before judgment. This procedure is intended only to secure to the creditor his rights when there is reason to believe that the debtor is about to depart from the jurisdiction of the Court as to make away with his property, and if the creditor procures the arrest of the debtor without reasonable or probable cause, he is liable to a regular suit for compensation, or to the summary process set out in section 491, *post*—*Goutiere* vs. *Charriol*, 1 Alla., 91.

An order should not issue under (*a*), (*b*) or (*c*), unless it should appear that the defendant is about to leave jurisdiction, &c., with one or other of the intentions described in the text—*Teenaram* vs. *Ram Rutton*, 2 Hyde, 181; but where a defendant is about to leave British India, it is sufficient if there is a reasonable probability that his going away may have the effect of obstructing or delaying execution of any decree that may be passed against him—*Agra and Masterman's Bank* vs. *Minto*, 1 Ind. Jur., N. S., 265; *Goutiere* vs. *Roberts*, 2 Alla., 358; though there seems to be a distinction between a person domiciled in India leaving it and a person having a domicile out of India, a mere bird of passage in India, withdrawing from jurisdiction—*Harrison* vs. *Dickson*, 1 Boulnois, 33. This section does not enable a creditor to sue out arrest before judgment, to secure easy execution of decrees—*Kelaram Manjee* vs. *Narain Dass*, 13 W. R., 278.

Order to bring up defendant to shew cause why he should not give security.

478. If the Court, after examining the applicant, and making such further investigation as it thinks fit, is satisfied—

that the defendant, with any such intent as aforesaid,

(*a*) has absconded or left the jurisdiction of the Court, or

(*b*) is about to abscond or to leave the jurisdiction of the Court, or

(*c*) has disposed of or removed from the jurisdiction of the Court his property or any part thereof, or

that the defendant is about to leave British India under the circumstances last aforesaid,

the Court may issue a warrant to arrest the defendant and bring him before the Court to shew cause why he should not give security for his appearance.

This section applies to H. C. and M. S. C. C.

No order can issue until the applicant has been examined, and such further investigation (if any) as may be deemed necessary has been made—*Kelaram Manjee* vs. *Narain Dass*, 13 W. R., 278.

If defendant fail to shew cause Court may order him to make deposit or give security.

479. If the defendant fail to shew such cause, the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to give

security for his appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit.

The surety shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

This section applies to H. C. and M. S. C. C.

Security.—The security required to be given by a defendant who is arrested before judgment, does not include security for costs. "Claim" in this section means the amount of money claimed, and has the same signification as in section 50, *ante*—*Reinhold* vs. *Holloway*, No. 655 of 1877.

Cause.—If the person has been charged with leaving India, good cause must be, either (1) that he is not going to leave India or not for so long a time as will obstruct or is likely to obstruct the plaintiff should he succeed, or that (2) the suit is not a *bonâ fide* one, or that (3) even if it is, the institution of it has been vexatiously delayed till the defendant is about to depart from India in order to embarrass or coerce him—*Spence's Hotel Company, Limited* vs. *Anderson and others*, 1 Ind. Jur., N. S., 294.

A defendant should not be committed unless he cannot shew good cause, or cannot deposit sufficient to meet the demand or is unable to give security not for the demand, but for his appearance—*Kelaram Manjee* vs. *Narain Dass*, 13 W. R., 278.

Procedure in case of application by surety to be discharged.

480. The surety for the appearance of the defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

On such application being made, the Court shall summon the defendant to appear, or, if it thinks fit, may issue a warrant for his arrest in the first instance.

On the appearance of the defendant, pursuant to the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

This section applies to H. C. and M. S. C. C.

The Court can secure the defendant's appearance by a warrant to the jailor—*Kelaram Manjee* vs. *Narain Dass*, 13 W. R., 278.

Procedure where defendant fails to give security or find fresh security.

481. If the defendant fail to comply with any order under section 479 or section 480, the Court may commit him to jail until the decision of the suit, or, if judgment be given against the defendant, until the execution of the decree: Provided that no person shall be imprisoned under this section in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees.

Provided that no person shall be detained in prison under this section after he has complied with such order.

This section applies to H. C. and M. S. C. C.

It is only in the event of a defendant neither furnishing security nor offering a sufficient deposit that he can be committed to custody—*Kelaram Manjee* vs. *Narain Dass*, 13 W. R., 278.

Where a person is arrested and required to give security to answer a claim against him, and he satisfies the claim, he cannot be made to give security for costs—*Reinhold* vs. *Holloway*, No. 655 of 1877, November 26th.

Where a person is arrested under this section, and a decree is afterwards obtained against him, the decree-holder, if he wishes to send the defendant to prison must have him brought before the Court and his subsistence money fixed in the same way as if he had been arrested in execution of the decree, and if he fails to do so, the defendant is entitled to his discharge—In the matter of *Kallah Chand Dass*, 1 Ind. Jur., N. S. 328; Bourke, 425.

Subsistence of defendants arrested.

482. The provisions of section 339 as to allowances payable for the subsistence of judgment-debtors shall apply to all defendants arrested under this chapter.

This section applies to H. C. and M. S. C. C.

See note under section 339, *ante*.

B.—Attachment before Judgment.

Application before judgment for security from defendant to satisfy decree, and in default, for attachment of property.

483. If at any stage of any suit the plaintiff satisfies the Court by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,

(*a*) is about to dispose of the whole or any part of his property, or to remove the same from the jurisdiction of the Court in which the suit is pending, or

(*b*) has quitted the jurisdiction of the Court, leaving therein property belonging to him,

the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him in such suit, and, on his failing to give such security, to direct that any portion of his property within the jurisdiction of the Court shall be attached until the further order of the Court.

Contents of application.

The application shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

This section applies to H. C. and M. S. C. C.

(*a*.) Before issuing process under this section, the Judge must be satisfied that the removal or disposition of the property is about to be made, with a view to evade or delay the execution of a decree which the defendant anticipates the plaintiff may obtain against him in the specific case. It is not necessary that the suit should have been actually commenced at the time of removal; but merely that the defendant should act on the supposition that it will be instituted—*Ram Narain Podder* vs. *Ezekiel Levy*, 2 Hyde, 183. This section does not apply where the defendant has actually parted with the property—*Soorjee Coomar Chatterjee* vs. *Isser Chunder Ghose*, 1 Bourke, 243; or the property is beyond the jurisdiction of the Court in which the suit is pending—*Haji Jiva Vur Muhammad* vs. *Abubakar Ibrahim Meman*, 8 Bom., 29; *Balaram Mullick* vs. *Solano*, 8 B.L.R., 335; *Kedar Nath Dutt* vs. *Seeva Veyana Rana*

Luchmun Chetty, 1. C. L. R., 336, dissenting from In re *Abraham*, 6 Bom., 170 ; or the property is the property in the suit, which must be followed under section 492, *post* — *Rasea Begum* vs. *William Jones*, S. D., N. W., 1863, p. 301 ; *Joynarain Geeree* vs. *Shibpersad Geeree*, 6 W. R., Mis., 1.

Although an attachment, previous to the date of the vesting order, in execution of a decree confers on the judgment-creditor, a right prior to that of the Official Assignee—*Anand Chandra Pal* vs. *Panchilal Sarma*, 5 B. L. R., 691 ; *Aga Mahomed Ali Seraji* vs. *Judah*, 7 B. L. R., 50 ; the law is otherwise as to attachment before judgment under this section—*Petumber Mundle* vs. *Gocool Dass Soonderjee*. 1 Ind. Jur., N. S., 327 ; *Rampershad* vs. *Callachand Dass*. 1 Ind. Jur., N. S., 325, 273 ; *Gamble* vs. *Bholagir*, 2 Bom., 149 ; *Bank of Bengal* vs. *Newton*, 12 B. L. R. App., 1 ; *Sarkies* vs. *Mussamut Bundho Baee*, 1 Alla., 172 ; *Miller* vs. *Mon Mohun Roy*, 8 C. L. R., 213. Attachment of property covers the profits of the property—*Ram Coomar Ghose* vs. *Gobind Nath Sandyal*, 12 W. R., 391.

A plaintiff applied for attachment, but a third partv intervened and claimed the property as his own. *Held*, he should not have been made a party to the suit, but that his claim should have been disposed of under section 186, Act VIII of 1859 (section 487, *post*)—*Ram Rutten Dass* vs. *Gobind Dass*, 2 Agra, 141.

A Court of Small Causes could not attach immoveable property under section 81, Act VIII of 1859—*Marthamma* vs. *Kittu Sheregara*, 6 Mad., 91.

Court may call on defendant to furnish security or shew cause.

484. If the Court, after examining the applicant and making any further investigation which it thinks fit, is satisfied that the defendant is about to dispose of or remove his property, with intent to obstruct or delay the execution of any decree that may be passed against him in the suit, or that he has with such intent quitted the jurisdiction of the Court, leaving therein property belonging to him, the Court may require him, within a time to be fixed by the Court, either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the sum, or such portion thereof as may be sufficient to satisfy the decree, or to appear and shew cause why he should not furnish security.

The Court may also in the order direct the conditional attachment of the whole or any portion of the property specified in the application.

This section applies to H. C. and M. S. C. C.

The property in dispute (if any) or property beyond jurisdiction cannot be attached under this section. See note on last section.

Cause can be shewn after the security has been furnished—*Lotlikar* vs. *Lotlikar*, I. L. R., 5 Bom., 643.

There is apparently no appeal from an order under this section—section 588 ; *Ahmed Ali Mahomed* vs. *Gladstone, Wyllie & Co.*, 7 W. R., 508.

Section 253, *ante*, applies to sureties under this section—*Baboo Ram Kishen Doss* vs. *Hurkhoo Sing*, 7 W. R., 329.

Attachment if cause not shewn or security not furnished.

485. If the defendant fail to shew cause why he should not furnish security, or fail to furnish the security required, within the time fixed by the Court, the Court may order that

the property specified in the application, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, shall be attached.

Withdrawal of attachment.

If the defendant shew such cause or furnish the required security, and the property specified in the application or any portion of it has been attached, the Court shall order the attachment to be withdrawn.

This section applies to H. C. and M. S. C. C.

Attachment cannot be ordered unless security has been demanded—Sudder Dewany Sum. Decis., June 12th 1848, and on one or other of the grounds stated in section 483—*Bipin Behari Ghose,* Petitioner, Sudder Dewany Sum. Decis., September 27th 1847.

An appeal lies from an order under this section—See section 588, *post.*

Mode of making attachment.

486. The attachment shall be made in the manner herein provided for the attachment of property in execution of a decree for money.

This section applies to H. C. and M. S. C. C.

Investigation of claims to property attached before judgment.

487. If any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for money.

This section applies to H. C. and M. S. C. C.

All claims to attached property should be disposed of under this section—*Ram Rutten Dass* vs. *Gobind Dass,* S. D., N. W., 1867, p. 141; and objection should be made by giving notice of the claim, and not by motion; the Court will usually give the application precedence of all other business—*Rammanick Shaw* vs. *Seebram Pantool,* 2 Hyde, 22.

Plaintiff applied for the attachment of certain property before judgment. Defendant's wife opposed, claiming an interest on the property, and the Court, making her a party to the suit, decreed the plaintiff's claim and released the property. It was held that the order releasing the property, although irregular, must be taken to have been passed under this section—*George* vs. *Ram Rutten,* S. D., N. W., 1868, p. 272

Removal of attachment when security furnished or suit dismissed.

488. Where an order of attachment before judgment is passed, the Court which passed the order shall remove the attachment whenever the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

This section applies to H. C. and M. S. C. C.

Attachment not to affect rights of strangers, or bar decree-holder from applying for sale.

489. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the

defendant from applying for the sale of the property under attachment in execution of such decree.

This section applies to H. C. and M. S. C. C.

The attachment does not affect the rights of persons not parties to the suit—*Sarkies* vs. *Mussamut Bundho Baee*, 1 Alla., 185; or prevent its being sold in execution of another decree, whether the decree has been obtained before or after the attachment—6 Mad., 135; no new attachment is necessary after decree—*Sarkies* vs. *Mussamut Bundho Baee*, 1 Alla., 172; and any private alienation made subsequent to attachment before judgment is null and void—*Id.*; *Rajchunder Roy* vs. *Issurchunder Roy*, Bourke, 141; *Sava Ramje* vs. *Jadhavji*, 2 Bom., 142.

Property attached under chapter not to be re-attached in execution of decree.

490. Where property is under attachment by virtue of the provisions of this chapter, and a decree is given in favour of the plaintiff, it shall not be necessary to re-attach the property in execution of such decree.

This section applies to H. C. and M. S. C. C.

If the same property is again attached after decree, the second attachment supersedes the first—*Ram Jeawaun* vs. *Ram Lall*, 2 Agra, 190; re-seizure is not necessary to perfect the second attachment—*Gamble* vs. *Bholagir*, 2 Bom., 150.

C.—Compensation for improper Arrests or Attachments.

Compensation for obtaining arrest or attachment on insufficient grounds.

491. If in any suit in which an arrest or attachment has been effected, it appears to the Court that such arrest or attachment was applied for on insufficient grounds,

or if the suit of the plaintiff fails, and it appears to the Court that there was no probable ground for instituting the suit,

the Court may, on the application of the defendant, award against the plaintiff in its decree such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the arrest or attachment:

Proviso.

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

An award under this section shall bar any suit for compensation in respect of such arrest or attachment.

This section applies to H. C. and M. S. C. C.

There is no appeal from an order under this section—see section 588, *post*. See also *Huro Soondurec Chowdrain* vs. *Bungshee Mohun Dass*, 8 W. R., 332.

Compensation can only be granted under this section by the Court which disposes of the cause—*Huro Soonduree Dossee* vs. *Bungsee Mohun Doss*, 3 W. R., Mis., 28; and on the recorded application of the defendant, and not of its own motion—*Ram Narain* vs. *Kurum* and *Gopaul*, S. D., N. W., 1863, p. 136. The defendant is not bound to apply for redress—*Goutiere* vs. *Charriol*, 1 Alla., 91; and by omitting to do so, he does not lose his right to bring a regular suit—*Daniel* vs. *Mohun Bibee*, 1 Agra, 104; but if he applies for compensation, any award that may be passed will

bar a regular suit—*Goburdhun Majhee* vs. *Banee Chunder Doss*, 21 W. R., 375. Where a regular suit is instituted, the plaintiff must prove that the process was sued out maliciously and without reasonable and probable cause—*Goutiere* vs. *Robert*, 2 Alla., 353; *Chowdhry Sheoraj Singh* vs. *Dwarka Dass*, 4 Alla., 42; and the presumption is that the process issued regularly, although the original suit was dismissed—*Dhurmo Narain Sahoo* vs. *Sreemutty Dassee*, 18 W. R., 440.

Compensation may be awarded for excessive attachment, notwithstanding that the plaintiff may be successful—*Shaikh Mahomed Rezaooddeen* vs. *Hossein Buksh Khan*, 6 W. R., Mis., 24.

A civil suit will lie for property which was attached, but made away with, by the plaintiff in collusion with the Court peon, without first instituting a criminal case—*Choitunno Paramanick* vs. *Zumeerooddee Shaikh*, 18 W. R., 27.

CHAPTER XXXV.

OF TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

A.—Temporary Injunctions.

Cases in which temporary injunction may be granted.

492. If in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or is about, to remove or dispose of his property with intent to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such injunction or other order.

This section applies to H. C. and M. S. C. C.

A plaintiff should enter a claim for injunction in his plaint, when obtaining it is a substantial object of his action—*Colebourne* vs. *Colebourne*, 1 Ch. D., 690.

Courts of Equity will not issue an injunction against officers of Government exercising a right or alleged sight to levy taxes, though they will against Municipal officers in regard to the levy of rates—*Hormasji Karsetji* vs. *Pedder*, 12 Bom., 199, 203, see section 495, *post*.

A Court in granting an *ad interim* injunction will first see that there is a *bonâ fide* contention between the parties, and then on which side in the event of success will lie the balance of inconvenience if the injunction does not issue —*Doherty* vs. *Allman*, 3 App. Cas., 709; *Nusserwanji Merwanji* vs. *Gordon*, L. R., 6 Bom., 266; *Magee* vs. *D'Arcy*, L. R., Ir. 4 Q. B. Div., 312. Real property should always be retained if possible in *statu quo* until the suit has been decided—*Gomes* vs. *Carter*, 1 Ind. Jur., N. S., 411. Plaintiffs, in possession of a dock used for repairing vessels, on being threatened by the defendants with a suit to eject them, sued for specific performance of an alleged agreement with the defendants under which they were entitled to hold the dock until their two vessels were repaired. In support of an application for an *interim* injunction to restrain proceedings in the suit for ejectment until the latter should have been decided, plaintiffs stated that on the faith of the agreement one of their ships had been docked and taken to pieces; that the repairs could not be finished for a con-

siderable time, and that the vessel could not be removed from the dock without great loss and irreparable injury to them. The defendant denied the agreement, and set forth another, and which having come to an end, they were entitled to eject. They did not deny the loss that would ensue to the plaintiffs, nor allege delay in repairing. *Held*, that the plaintiffs were entitled to an *interim* injunction restraining the defendants from executing the ejectment decree until the suit had been decided—*Moran* vs. *The River Steam Navigation Co.*, 14 B. L. R., 352.

Evidence should be adduced to prove that the property in dispute is in danger of being wasted or dealt with in one or other of the manners described in this section—*Prosunno Moyee Dossee* vs. *Wooma Moyee Dassee*, 14 W. R., 409; *Dhunderam Santukram* vs. *Chandanabai*, 2 Bom., 98. In a suit for a specific sum of money if the defendant expresses his intention of employing it in trade, an injunction should issue—*Goluck Chunder Gooho* vs. *Mohim Chunder Ghose*, 13 W. R., 95; but not wher ethe suit is for real property, or for the purpose of stopping execution proceedings after a claim under section 246 had been dismissed—*Roy Luchmeeput Singh Bahadoor* vs. *Secretary of State*, 20 W. R., 11, and the defendant admittedly had a half share in it—*Mun Mohinee Dassee* vs. *Ichamoyee Dassee*, 13 W. R., 60; or the property covered by the injunction is not the property in dispute—*Joynarain Geeree* vs. *Shibpershad Gseree*, 6 W. R., Mis., 1; or the person against whom it is asked is not a party to the suit.

The injunction can only issue out of the Court trying the suit—*Dhunderam Santukram* vs. *Chandanabai*, 2 Bom., 98. It ceases when the suit comes to an end and does not subsist pending appeal—*Sheikh Moheooddeen* vs. *Sheikh Ahmed Hossein*, 14 W. R., 384.

An appeal lies from orders passed under this section, (section 588, *post*.)

When money due to an insolvent is deposited in Court, and the Court orders payment to the creditors instead of to the Official Assignee, the remedy of the latter is to sue out an injunction to restrain the creditors and apply for an *ad interim* injunction—In the matter of *Miller*, 12 W. R., 103. When A obtained a decree against B for possession of a dwelling-house in which C was admittedly interested as a co-sharer, and C brought a suit to declare that A had obtained no title to the property, an injunction restraining A from executing the decree was allowed—*Annantnath Dey* vs. *Mackintosh*, 6 B. L. R., 571. So where A caused C to be improperly placed on the record as the legal representative of B, C obtained an injunction against A restraining him from executing the decree against him—*Dhuronidhur Sen* vs. *Agra Bank*, 4 C. L. R., 434; I. L. R., 5 Cal., 86. An injunction will be allowed to restrain the publication of a libel injurious to the plaintiff's trade—*Therbey's Cattle Food Company* vs. *Massam*, 14 Ch. Div., 763.

As to a case of mandatory injunction in connection with an obstruction to light and air, see—*Provabutty Dabee* vs. *Mohendro Lall*, I. L. R., 7 Cal., 453.

Injunction to restrain repetition or continuance of breach.

493. In any suit for restraining the defendant from committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

The Court may by order grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit, or refuse the same.

In case of disobedience, an injunction granted under this section or section 492 may be enforced by the imprison-

ment of the defendant for a term not exceeding six months, or the attachment of his property, or both.

No attachment under this section shall remain in force for more than one year, at the end of which time, if the defendant has not obeyed the injunction, the property attached may be sold, and out of the proceeds the Court may award to the plaintiff such compensation as it thinks fit, and may pay the balance, if any, to the defendant.

This section applies to H. C.

This section does not refer to persons in prison for contempt—*Martin* vs. *Lawrence*, I. L. R., 4 Cal., 655.

An injunction will not be granted to restrain a Hindu woman from marrying her minor daughter to a third party, pending the decision of a suit for specific performance of a contract of marriage—In the matter of *Gunpat Narain Singh*, 24 W. R., 207.

Before granting injunction, Court to direct notice to opposit party.

494. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

This section applies to H. C.

Ex-parte.—Such an injunction is a deviation from the ordinary course of justice and nothing but the existence of great and serious danger not capable of being averted probably, if delay be interposed, can justify its issue—*Freeman* vs. *McArthur*, 2 Tay. and Bell, 25.

And if an injunction is obtained *ex-parte* on facts of which a material one is false, the injunction will be dissolved although by the affidavits filed when the motion for the dissolution is made there appear sufficient grounds for granting it—*Sohochurry Dossee* vs. *Roy*, 2 Boulnois, 62; see also *Freeman* vs. *McArthur*, 2 Tay. and Bell, 10.

Injunction to Corporation binding on its members and officers.

495. An injunction directed to a Corporation or public Company is binding not only on the Corporation or Company itself, but also on all members and officers of the Corporation or Company whose personal action it seeks to restrain.

This section applies to H. C.

See note under section 492, *ante*.

Order for injunction may be discharged, varied or set aside.

496. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

This section applies to H. C.

Compensation to defendant for issue of injunction on insufficient grounds.

497. If it appears to the Court that an injunction which it has granted was applied for on insufficient grounds, or

if, after the issue of the injunction, the suit is dismissed or judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit,

the Court may, on the application of the defendant, award against the plaintiff in its decree such sum, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the issue of the injunction:

Proviso.

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

An award under this section shall bar any suit for compensation in respect of the issue of the injunction.

This section applies to H. C.

Any person not desirous of taking advantage of the remedy given by this section may bring a regular suit—*Wilson* vs. *Kunhya Sahoo*, 11 W. R., 143.

Award.—In section 96, Act VIII, 1859, the words were "award of compensation," and it was held the denial of compensation under it did not bar a regular suit—*Nund Coomar Shaha* vs. *Gour Sunkur*, 13 W. R., 305; and under the present section apparently, the denial of compensation would not "be an award."

B.—Interlocutory Orders.

Power to order *interim* sale of perishable articles.

498. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject of such suit, which is subject to speedy and natural decay.

Judicature Acts, order 52, rule 2. This section applies to H. C.

Power to make order for detention, &c., of subject-matter, and to authorize entry, taking of samples and experiments.

499. The Court may, on the application of any party to a suit, and on such terms as it thinks fit,

(*a*) make an order for the detention, preservation or inspection of any property being the subject of such suit;

(*b*) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit, and

(*c*) for all or any of the purposes aforesaid, authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

The provisions hereinbefore contained as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this section.

Judicature Acts, order 52, rule 3. This section applies to H. C.

Application for such orders to be after notice.

500. An application by the plaintiff for an order under section 498 or section 499 may be made after notice in writing to the defendant at any time after service of the summons.

An application by the defendant for a like order may be made after notice in writing to the plaintiff, and at any time after the applicant has appeared.

Judicature Acts, order 52, rule 4. This section applies to H. C.

Either party may apply for the order after notice; the plaintiff after service of summons, the defendant after he has appeared. If both apply, only one order should be passed on the two applications—*J. Sargant* vs. *Read*, 1 Ch. D., 600.

A plaintiff should enter in his plaint his claim for an injunction, when the obtaining of it is a substantial object of his suit—*Colebourne* vs. *Colebourne*, 1 Ch. D., 690.

When party may be put in immediate possession of land the subject of suit.

501. When land paying revenue to Government, or a tenure liable to sale, is the subject of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereupon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereupon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

This section applies to H. C. and M. S. C. C

Deposit of money, &c., in Court.

502. When the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

This section applies to H. C. and M. S. C. C.

Where a defendant was ordered to deposit money due, but refused to do so, he was held liable to pay interest on the money from the date of the order—*Ram Dass Gossammee* vs. *Prosunno Moyee Dassee*, 16 W. R., 297.

CHAPTER XXXVI.

APPOINTMENT OF RECEIVERS.

Power of Court to appoint Receivers.

503. Whenever it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immoveable, the subject of a suit, or under attachment, the Court may by order—

(*a*) appoint a Receiver of such property,

and, if need be,

(*b*) remove the person in whose possession or custody the property may be from the possession or custody thereof;

(*c*) commit the same to the custody or management of such Receiver; and

(*d*) grant to such Receiver such fee or commission on the rents and profits of the property by way of remuneration, and all such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the Court thinks fit.

Receiver's liabilities.

Every Receiver so appointed shall—

(*e*) give such security (if any) as the Court think fit duly to account for what he shall receive in respect of the property;

(*f*) pass his accounts at such periods and in such form as the Court directs;

(*g*) pay the balance due from him thereon as the Court directs; and

(*h*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Nothing in this section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.

This section applies to H. C.

In making an application under this section on affidavit, the affidavit should contain the facts and not merely follow the words of the Act—In the goods of *Okilmoney Dossee*, Fulton, 90; and should show special reasons for the appointment *Gossain Dulmer* vs. *Lekait Het Narain* 6 C. L. R., 467.

A Court should not appoint a Receiver under section 243, Act VIII of 1859 (305), where the application has beeen made simply to put off payment—*Oottum Singh* vs. *Ram Surun Lall*, 23 W. R., 287; nôr to realize the profits of the property attached and pay off the debtors, when it would take 20 years *Mohinee Mohun Dass* vs. *Ram Kant Chowdhry*, 15 W. R., 322, or 15 years—*Rednun Achutaramayya* vs. *Khaja Mahomed Aminkhan*, 5 Mad., 272, or even one year to do so—*Fyzoódeen* vs. *Giraudh Singh*, 2 Alla., 1; though 6 months would not be considered unreasonable—*Mohinee Mohun Dass* vs. *Ram Kant Chowdhry*, 15 W. R., 322; and where a Judge on the death of a Receiver, finding that under the management the decree would not be satisfied for a long time, refused to appoint a new Receiver and ordered execution to issue, his order was upheld—*Baboo Doorga Dutt Singh* vs. *Baboo Bunwaree Lall Sahoo*, 25 W. R., 33; and the fact of a Receiver having been appointed to reali e the profits with a view to satisfy certain decrees, does not bar the Court on the application of another creditor from ordering a sale if the proceeds are insufficient to pay off the decretal amount in a reasonable period—*Din Dyal Lall* vs. *Ram Rutton Neogee*, 16 W. R. 46; see also *Dinobundhoo Singh* vs. *Macnaghten*, 2 C. L. R., 185. Where one entitled to a share of real estate applied for a Receiver of the entire joint property, and some of the co-sharers who resisted the appointment were not subject to the jurisdiction of the Court a Receiver was only granted for the share of the applicant—*Chowdhry* vs. *Chowdhry*, 2 Tay. and Bell, 192.

A Receiver should not be appointed for a portion of a railway—*Latimer* vs. *Aylesbury Railway Company*, 9 Ch. Div., 385.

The circumstance that a judgment-debtor has property other than that attached, is in itself no ground for refusing his application for the appointment of a Receiver, if he proposes to place all the properties under the management of the Court. The Judge should consider all the circumstances of the case—*Debkumari Bibi* vs. *Ram Lall Mookerjee*, 3 B.L.R., App., 107. Where the property to be managed is not the subject of the suit, no manager can be appointed before attachment—*Bunwaree Lall Sahoo* vs. *Baboo Girdharee Singh*, 16 W. R., 273; on the other hand, the appointing a manager does not release the property from attachment—*Bunwari Lall Sahoo* vs. *Mohabeer Proshad Singh*, L. R.. 1 Ind. App., 95; *Mohabeer Pershad Singh* vs. *Collector of Tirhoot*, 13 W. R., 423.

A Receiver may be appointed without the consent of the decree-holder—*Thakoor Chunder*, petitioner, Marsh., 261; even though the latter has a lien on the property as a collateral security, and he has taken a money decree stating that the property is liable—*Mohunt Ram Rucha Doss* vs. *Doorga Dutt Misser*, 13 W. R., 453; nor should he be dismissed *ex parte* at the decree-holder's request—*Huree Sunker Mookerjee* vs. *Jogendro Coomar Mookerjee*, 19 W. R., 66; but a party or his attorney should not, save in an extreme case be appointed Receiver without the consent of the other party—In re *Lloyd*, 12 Ch. Div., 447. His duties as officer of the Court are confined to realizing, preserving, and managing the property, for the collection of the moneys and money profits due to the debtor; if he does anything beyond this, he must be looked on, not as an officer of Court, but an agent for the judgment-debtor—*Tiel & Co.* vs. *Abdool Hye*, 19 W. R., 37. His powers at best are no more than those which the parties to the suit turn out to be possessed of when the case is finally decided; but if he takes possession of property under colour of his appointment, his conduct cannot be disputed by a motion to discharge or get rid of the attachment—*Bissessuree Debia*, petitioner, 15 W. R., 347. A Receiver appointed in execution can sue for any debts attached—*Mussamut Rambutty Kooer* vs. *Kamessur Pershad*, 22 W. R., 36, but see also *Reazut Hossein Khan* vs. *Jaggunnath Singh*, 21 W. R., 419; or the property of the judgment-debtor—*Mirza Mahomed* vs. *The widow of Balmakund*, L. R., 3 Ind. App., at p. 245.

Where the property under attachment could not be sold, and the Court directed the tenants to pay their rents to the judgment-creditor. *Held*, the latter must be looked upon as a receiver—*Radha Kishore Bose* vs. *Afub Chundra*, I. L. R., 7 Cal., 61.

The appointment of a Receiver does not date from the order of appointment but from the date of giving the security required—*Edwards* vs. *Edwards*, 2 Ch. D., 291. He has no estate or interest in himself and his power to manage is created simply by the order of the Court appointing him and is binding only on the persons before the Court—*Nilmadhab Kundul* vs. *Gillander*, 2 Sev., 957; and his possession is the possession of all the parties—*Wrixon* vs. *Vise*, 3 Dr. and War, 104; *Parkisson* vs. *Lucas*, 8 Beav., 627. A person not a party to an action is not entitled to apply by motion for payment of money to him by the Receiver—*Brocklebank* vs. *East London Ry. Co.*, 12 Ch. Div., 839.

Appeal.—An appeal lies from an order passed under this section—*Birajan Koer* vs. *Ram Churn*, I. L. R., 7 Cal., 719, section 588, *post*; or when the application is refused—*Gossain Dulmir* vs. *Tekait Hetnarain*, 6 C. L. R., 467. Where one of the

defendants in a suit applied to have a receiver removed from his office on the ground of mismanagement and the application was refused, an appeal was allowed on the ground that the question was one arising in execution of decree—*Methebhai* vs. *Limji*, I. L. R., 5 Bom., 45.

When Collector may be appointed Receiver.

504. Where the property is land paying revenue to Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may appoint the Collector to be Receiver of such property.

This section applies to H. C.

Courts empowered under this chapter.

505. The powers conferred by this chapter shall be exercised only by High Courts and District Courts: provided that whenever the Judge of a Court subordinate to a District Court considers it expedient that a Receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment, and submit such person's name, with the grounds for the nomination, to the District Court, and the District Court shall authorize such Judge to appoint the person so nominated, or pass such other order as it thinks fit.

An order made by a Subordinate Judge dismissing an application made under this section for the appointment of a receiver, after obtaining sanction from the judge, is an order under section 503 and not an order under this section—*Gossain Dulwir Puri* vs. *Tekait Hetnarain*, 6 C. L. R., 467.

The first thing the Subordinate Judge is to do is *nominate* for the receiveship the person he approves of and send the name to the District Judge; from this proceeding there is no appeal. The Judge then approves and authorizes the appointment and from this order there is no appeal. The Subordinate Judge then *appoints* the Receiver and from this order there is an appeal—*Birajan Koer* vs. *Ram Chunder Mahta*, 9 C. L. R., 203.

Such other order as he thinks fit., *i. e.*, such other direction as he may think fit to give to the Subordinate Judge—*Birajan Koer* vs. *Ram Chunder Mahta*, 9 C. L. R., 203.

PART V.

OF SPECIAL PROCEEDINGS.

CHAPTER XXXVII.

REFERENCE TO ARBITRATION.

Parties to suit may apply for order of reference.

506. If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any

time before judgment is pronounced, apply, in person or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of reference.

Every such application shall be in writing and shall state the particular matter sought to be referred.

This section applies to H. C. and M. S. C. C.

All the parties.—All the parties to the suit who are interested must concur in making the reference—*Bykunt Nath Chatterjee* vs. *Shaikh Nuzuroodeen*, 10 W. R., 171; 1 B. L. R., S. N. xi.; and in the issue to be determined—*Sheonath* vs. *Ramnath*, 10 Moore, 427. It is not sufficient that they do not object—*Deegumber Chatterjee* vs. *Mussamut Ram Prea Dabea*, Marsh., 517. But though an award, which has not been made on a reference by all the parties, cannot be converted into a final decree in the manner laid down in this chapter, it is not null and void, but is evidence against the parties concerned—*Beejoy Chunder Banerjee* vs. *Bhyrub Chunder Banerjee*, 15 W. R., 427. In a suit in which A claimed a 6 annas share of certain property, all the defendants expect one referred the matter to arbitration, and the arbitrators found that the plaintiff's right extended over 44 beegahs more than had been awarded by the Court. It was held that the plaintiffs were entitled to their share in the 44 beegahs as against all the defendants except the defendant who refused to arbitrate—*Doorga Churn Thakoor* vs. *Kally Doss Hazrah*, 10 W. R., 463; see also *Ram Soondur Mookerjee* vs. *Ram Shurun*, 6 W. R., 25; and where a person was added as plaintiff while the case was pending before arbitrators, and he made no objection to the arbitration, but suffered the arbitrators to give their award, he was considered as having agreed to the arbitration *ab initio* and bound by it—*Shitanath Biswas* vs. *Kishen Mohun Mookerjee*, 5 W. R., 130. This decision has gone very far—See *Sheonath* vs. *Ramnath*, 5 W. R., P. C., 21. It has been held in England that by acting under an agreement to refer plaintiff was precluded from setting it aside as fraudulent—*Ormes* vs. *Beadel*, 6 Jur., N. S., 1103.

In writing.—The application must be made in writing. either by the parties in person or their pleaders specially authorized—*Moonshee Gazee* vs. *Hameed Buksh*, 16 W. R., 160; *Gooro Chunder Puteetundo* vs. *Joogul Chunder*, 1 W. R., 80; *Bhrijoo Roy* vs. *Bhogruth Upadhya*, W. R., 1864, Act X; and pleaders cannot consent to a reference on behalf of their clients, nor a plaintiff on behalf of his co-plaintiff, without special authority—*Moonshee Gazee* vs. *Hameed Buksh*, 16 W. R., 160; *Gour Chunder Puteetundo* vs. *Joogul Chunder*, 1 W. R., 80. Whether the exception to this rule, namely, where all the parties are present in Court, will still continue, is doubtful—*Mirja Akber Beg* vs. *Bunda Ali*, 2 Alla., 419; *Jey Asankira Devi* vs. *Nagannada Devi*, 1 Mad., 106; for every application must be in writing and must state the particular matter sought to be referred; and unless the terms of the section are complied with, jurisdiction does not arise—*Nusseerwange Pestonjee* vs. *Meer Mynoodeen Khan*, 6 Moore, 155: *Doolhun Miser* vs. *Shah Tassud Hossen*, S. D., N. W., 1864, p. 215. See also *Haines* vs. *East India Co.*, 6 Moore, at p. 485.

An agreement to refer to arbitration cannot be revoked, unless for good cause; an arbitrary revocation is not permitted—*Pestonjee Nussurwanjee* vs. *Manockjee*, 12 Moore, 130; *Mussamut Ablakee Kooer* vs. *Oodun Singh*, 15 W. R., 331; *Nagasaawmy Naik* vs. *Rungasamy Naik*, 8 Mad., 46. But where, as under this section, the reference to arbitration is made by an order of Court, neither party can annul or revoke it—*Nilmonee Bose* vs. *Mohima Chunder Dutt*, 17 W. R., 516.

After a reference to arbitration with the consent of parties, a plea of limitation is inadmissible—*Beharee Lall* vs. *Unoop Singh*, S. D., N. W., 1864, p. 472.

Where parties in a suit for possession agree to arbitrate the question of title plaintiff relinquishing his prayer for possession, the agreement contains an implied undertaking that the defendant shall give up possession if the decision be adverse to him—*Raj Narain Roy* vs. *Modhoo Soodun Mookerjee*, 20 W. R., 19.

This chapter does not apply to rent suits in Bengal—*Moonshee Gazee* vs. *Hameed Buksh*, 16 W. R., 160. But it has been held in the North-West that under the general law parties to suits may before issue and by the leave of the Court joined refer matters in dispute in a rent case to arbitration and after issue joined—*Gosain Girdhariji* vs. *Durga Debi*, I. L. R., 2 Alla., 119.

An Appellate Court can act under this section—*Chiranj Lal* vs. *Jamna Doss*, 7 Alla., 243; *Gangaralingain Petitioner*, I. L. R., 3 Mad., 78; it cannot—*Juggeshur Dey* vs. *Kritbartha Moyee Dossee*, 21 W. R., 210.

A case having gone up on appeal, the Judge referred it to the first Court to call upon the parties to the suit to refer some of the issues to arbitration, or failing their doing so, the Court itself was to appoint arbitrators. *Held*, that the order was not one made without jurisdiction, but was an irregular proceeding which might be cured by the consent of the parties—*Puna Bibee* vs. *Khoda Baksh Beparee*, 22 W. R., 396.

This section and section 522, *post*, are enabling sections, and are not intended to be restrictive or exclusive. Parties *sui juris* are competent before decree to make any agreement as to the settlement of the suit—*Jogessur Banerjee* vs. *Kulyanee Churn Deo*, 24 W. R., 41.

Nomination of arbitrator.

507. The arbitrator shall be nominated by the parties in such manner as may be agreed upon between them.

When Court to nominate arbitrator.

If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the Court, the Court shall nominate the arbitrator.

This section applies to H. C. and M. S. C. C.

The parties must either name the arbitrators or consent to their nomination by the Court—*Sheonath* vs. *Ramnath*, 10 Moore., 425. The Court should not nominate any person until it has ascertained whether he will accept office—*Troyluckhonath Roy* vs. *Collector of Beerbhoom*, W. R., 1864, p. 388. Where both parties could not agree in nominating an arbitrator, and the Judge nominated one under this section, and defendant six weeks afterwards objected that he did not nominate him, it was held that, looking at the evidence, the defendant must be considered to have desired that the Judge should nominate, and that the nomination was binding—*Suroop Ram Deb* vs. *Gobind Ram Deb*, 7 W. R., 13.

An arbitrator has full power to retract his resignation before it has been accepted—*Maharajah Joy Mungul Singh* vs. *Mohun Ram Marware*, 15 W. R., 38; 23 W. R., 429.

Order of reference

508. The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award, and specify such time in the order.

When once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as hereinafter provided

This section applies to H. C. and M. S. C. C.

Such time.—If no time is fixed in the order of Court, the award falls to the ground—*Gunga Gobind Naek* vs. *Kalee Prosunno Naek*, 10 W. R., 206; 1 B. L. R., S. N., xiii; In the matter of *Joy Mungul Singh*, 11 W. R., 433; *Nusserwanjee Pestonjee* vs. *Meer Mynooddeen*, 6 Moore, 134. Such is the doctrine in Calcutta; but in Allahabad it does not avoid the award, and if the parties permit the reference to proceed without making any objection until the award has been delivered, such an objection will not be listened to—*Mubarick Ali* vs. *Kadir Baksh*, 7 Alla., 351. The first decision is more in consonance with the spirit of the present Act, which declares that awards are invalid, if not made within the period allowed by the Courts,—section 521, *post*.

By an order of Court, a suit was referred to two arbitrators, who were to make their award within three months. After the expiry of this period the defendant took part in the proceedings, but finally objected to any award being made. The arbitrators took no notice of the objection and finished the reference. It was held that the award was good—*Juggat Soonderi Dasi* vs. *Sonaton Bysak*, 5 B. L. R., 357. But there was a clause in section 318 of the Act (and on this the Court relied) declaring that no award should be set aside only by reason of its not having been completed within the period allowed by the Court. An award after the time allowed is now invalid—section 521. Where a suit was referred to arbitrators who were to make their award within six months, and nothing was done within that time: *Held*, on an application by the plaintiff to have the suit restored to the file of the Court, that the suit was still pending, the arbitrators not having determined it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court—*Gapi Nath Nandi* vs. *Shib Chandra Nandi*, 6 B. L. R., App., 74.

Matter in difference.—The order of reference should state all the points which are referred to arbitration. It is important that this should be done carefully, since once a case is referred to arbitation it must be dealt with in accordance with the provisions of this chapter, and it cannot be tried unless the reference fails—*Hara-*

dhun Dutt vs. *Radha Nath Shaha,* 10 W. R., 398. Looking at the wording of the section, it is doubtful if a general reference is allowable. Under Act VIII, where the issues were not definitely laid down in a general reference of "all matters in difference in the suit," the arbitrators were held bound to ascertain the points at issue and come to a finding on them—*Luchmee Narain* vs. *Pyle,* 2 Alla., 150; and such a general reference gave the arbitrators exclusive jurisdiction to deal with the costs of the suit—*Koylas Chunder Shaw* vs. *Muddoosoodun Chowdhry,* 2 Ind. Jur., N. S., 12; and with the costs of reference and award, and interest after the date of submission—*Mohonlall* vs. *Nathuram,* 1 B. L. R., 144; and the Court could not amend the award—*Barrut Chunder Doss* vs. *Damjee,* Coryton, 150; but now it can as regards costs—section 519, *post.* Where matters in dispute are referred to arbitration, and it is found that one question at issue is omitted from the reference, and that the award contains no decision thereon, the party interested should bring the omission to the notice of the Court; if he does not do so, the Court is not wrong in not passing any order at all on the point—*Ram Narain Roy* vs. *Juggessur Mookerjee,* 14 W. R., 247.

When a dispute has been referred to arbitration, the Court cannot go into the merits of the case, or dispose of it otherwise than under this chapter—*Haradhun Dutt* vs. *Radhnath Shaha,* 10 W. R., 398. Nor will the Court confirm an order passed by the arbitrators making payment of their fees a audition precedent to hearing the reference—*Steel* vs. *Robarts,* 1. L. R., 6 Cal., 809.

The decision of arbitrators in a matter not in difference between the parties, and not referred to them, is null and void—*Moshahel Singh* vs. *Konomutty Bewa,* 15 W. R., 172. Where certain matters are referred to arbitrators by the Judge and other matters by the parties, care should be taken that they should be distinctly separated and not mixed up together—*Roghoo Nundun Lall Sahoo* vs. *Bunwaree Lall Sahoo,* 3 W. R., Mis., 27. Arbitrators cannot delegate their powers to others—*Surubjeet Narain Singh* vs. *Gour Pershad Narain Singh,* 7 W. R., 269.

The arbitrators should confine themselves to the matters referred, and only take such legal evidence as is necessary to decide that—*Krishna Kanta Poramanick* vs. *Braju Sundari Dassi,* 2 B. L. R. App., 25. Where an arbitrator imported into his proceeding a previous enquiry alleged to have been made by him and relied upon admissions made in former proceedings, his award was held bad—*Kanhye Chund Gossamee* vs. *Ram Chunder Gossamee,* 24 W. R., 81.

When reference is to two or more, order to provide for difference of opinion.

509. If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators,

(*a*) by the appointment of an umpire, or

(*b*) by declaring that the decision shall be with the majority, if the major part of the arbitrators agree, or

(*c*) by empowering the arbitrators to appoint an umpire, or

(*d*) otherwise, as may be agreed between the parties; or, if they cannot agree, as the Court determines.

If an umpire is appointed, the Court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act.

This section applies to H. C, and M. S. C. C.

Difference of Opinion—When a suit is referred to arbitration, the order of reference should provide for the appointment of an umpire in case of any difference of opinion among the arbitrators, and should declare that the decision shall be with the majority—*Haradhun Dutt* vs. *Radhanath Shaha,* 10 W. R., 398; if not, the award must be made and signed by all the arbitrators—*Junglee Ram* vs. *Ram Heet Sakoy,* 19 W. R., 47; *Baboo Surubjeet Narain Singh* vs. *Baboo Gouree Pershad Narain Singh,* 7 W. R., 269; *Nem Roy* vs. *Bharut Roy,* 22 W. R., 129. The mere absence of a clause in the order of reference to arbitration providing for a difference of opinion between the arbitrators cannot vitiate the award where there is no such difference of opinion—*Gour Chunder Bhuttacharjee* vs. *Sodoy Chunder Nundee,* 17 W. R., 90. A case cannot in special appeal be sent back to the arbitrators, with a provision for difference of opinion, where, the arbitrators having given

in differing awards, the case was tried anew by the first Court whose decision was confirmed on appeal—*Thakoor Dass Chuckerbutty* vs. *Ram Jeebun*, 14 W. R., 150. See, however, *Huranhan Dutt* vs *Rudhanath Shaha*, 2 B. L R., S. N., xiv.

If the decision lies with the majority, then their award in the absence of the minority, provided they have had due notice, is a legal award, unless their absence is due to one or other of the causes enumerated in section 510, *post*—*Kedarnath* vs. *Mussamut Gunga Baee*, S. D., N. W., 1861, p. 541. So an award signed by two out of three arbitrators was held good, the third having first taken part in the proceedings then avoided attendance and finally refused to act—*Mithun Lall* vs. *Ram Chund*, id., 895 [but see against this—*Busunt Rai* vs. *Girdharee Singh*, 3 Agra, 93] ; and an award was held good where the third arbitrator, having sat with the others throughout the enquiry, declined to record an opinion on the last day—*Gokul* vs. *Bunsee and Jhaoo*, id., 1862, p. 448. Partial disagreement of two arbitrators does not nullify their award as a whole—*Sheikh Ponaoollah* vs. *Sheikh Tumeezooddeen*, 2 W. R., 32.

Death, incapacity, &c., of arbitrators or umpire.

510. If the arbitrator, or, where there are more arbitrators than one, any of the arbitrators, or the umpire, dies, or refuses, or neglects or becomes incapable to act, or leaves British India under circumstances shewing that he will probably not return at an early date, the Court may in its discretion either appoint a new arbitrator or umpire in the place of the person so dying, or refusing, or neglecting, or becoming incapable to act, or leaving British India, or make an order superseding the arbitration, and in such case shall proceed with the suit.

This section applies to H. C. and M. S. C. C.

It is not incumbent on the Court to appoint new arbitrators when some of those originally appointed have refused to act, unless both parties agree—*Sada Sookh* vs. *Shiva Dyal*, 1 Agra, 109. The power of the Court to appoint may be limited and controlled by agreement. B and C submitted to arbitration in the terms that the umpire should be selected from seven persons named. The umpire first selected refused to act, and the Court appointed a new umpire, who was not one of the seven persons mentioned in the submission. *Held*, that the umpire not being one of the seven, the award was invalid—*Barracho* vs. *Sowza*, 7 Mad., 73. The Judge has the sole power of appointing fresh arbitrators in the room of such as refuse to act—*Huronath Roy* vs. *Kasheenath Roy*, W. R., 1864, p. 338 ; and he may appoint one new arbitrator in place of several old arbitrators—*Rampersad* vs. *Jaggernath*, 6 C. L. R., 1.

When an arbitration has failed, and the record has been returned the Court cannot dismiss the suit, but must fix a day for the hearing and give notice to the parties—*Muddun Mohun Singh* vs. *Kanye Dass Chuckerbutty*, 23 W. R., 21.

Consent of all parties is not necessary to obtain an order under this section—*Rampersaud* vs. *Juggernath*, 6 C. L. R., 1.

Appointment of umpire by Court.

511. Where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any of the parties may serve the arbitrators with a written notice to appoint an umpire; and if, within seven days after such notice has been served, or such further time as the Court may in each case allow, no umpire be appointed, the Court, upon the application of the party who has served such notice as aforesaid, may appoint an umpire.

This section applies to H. C. and M. S. C. C.

Powers of arbitrator or umpire appointed under sections 509,510,511

512. Every arbitrator or umpire appointed under section 509, section 510 or section 511 shall have the like powers as if his name had been inserted in the order of reference.

This section applies to H. C. and M. S. C. C.

Summoning witnesses.

513. The Court shall issue the same processes to the parties and witnesses whom the arbitrators or umpire desire or desires to examine, as the Court may issue in suits tried before it.

Punishment for default, &c.

Persons not attending in accordance with such process, or making any other default or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

This section applies to H. C. and M. S. C. C.

If the defendant does not appear, the arbitration may proceed *ex-parte*—*Gokul Chand* vs. *Girdharee Lall*, S, D., N. W., 1866, p. 83.

Extension of time for making award.

Supersession of arbitration.

514. If, from the want of the necessary evidence or information, or from any other cause, the arbitrators cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either grant a further time, and from time to time enlarge the period for the delivery of the award, or make an order superseding the arbitration, and in such case shall proceed with the suit.

This section applies to H. C. and M. S. C. C.

Further time.—Under this section the Court may at its discretion enlarge the period for the delivery of an award of arbitration without the consent of, and even if opposed by, the parties—*Gobind Chunder Paul Chowdhry* vs. *Ram Kishen Paul Chowdhry*, 2 W. R., 297. The application for extension shou d be made in writing and so should the order on it—*Monji Premji* vs. *Mali Yakeb*, I. L. R., 3 Mad., 59. Submission to the Court under Act VIII of 1859, section 320, was held not necessary to the completion of an award within the meaning of section 318 (the present section)—*Jagatsunderi Dasi* vs. *Sanatun Bysack*, 5 Ben., 357.

Any other cause.—Where one of the arbitrators had been ill, and the time elapsed before they could make their award, the Court superseded the arbitartion and recalled the suit—*Joseph* vs. *Seerker*, Bourke, 359.

When umpire may arbitrate in lieu of arbitrators.

515. When an umpire has been appointed, he may enter on the reference in the place of the arbitrators

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) when they have delivered to the Court or to the umpire a notice in writing, stating that they cannot agree.

This section applies to H. C and M. S. C. C.

Award to be signed and filed.

516. When an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any de-

positions and documents which have been taken and proved before them; and notice of the filling shall be given to the parties.

This section applies to H. C. and M. S. C. C.

Award.—The making of an award is a judicial act, and must be done by the arbitrators in the presence of one another and at the same time—*Maharajah Sir Joy Mungul Singh* vs. *Mohun Ram Tewaree*, 12 W. R., 397; 23 W. R., 429; but when the case has been regularly heard by the arbitrators sitting together, and an award has been drawn up and signed by them, the mere omission to sign the award at the same time and in each other's presence does not invalidate it—*Bhabasundari Dasi* vs. *Makhunlall Dey*, 8 B. L. R., 128. For the judicial portion of their duties is ordinarily at an end when they have come to a final conclusion, so that if all the arbitrators draw up and sign a rough draft award, the validity of the draft award cannot be impeached because they made out a fair copy. The draft is the award—*Kula Nagabushanam* vs. *Kula Sheshachalam*, 1 Mad., 178. Arbitrators cannot delegate their authority to others—*Baboo Surubjeet Narain Singh* vs. *Baboo Gouree Pershad Narain Singh*, 7 W. R., 269. An award under this section should be a single instrument complete in itself, and should not consist of two papers bearing different dates—*Maharajah Sir Joy Mungul Singh* vs. *Mohun Ram Marwaree*, 12 W. R., 397.

The act of an arbitrator in handing an award to the proper officer of the Court to be filed is not an application within the meaning of the Limitation Act—*Robarts* vs. *Harrison*, 9 C. L. R., 209.

They may deliver their award to a third person to be filed—*S. M. Jagatsunderi Dasi* vs. *Sonatan Bysack*, 5 B. L. R., 357; and if they deliver it to a party, they should not hand over with it the proceedings, depositions and exhibits in the suit. These they must deliver to the Court. The correct procedure is to return the award and record direct—*Maharajah Sir Joy Mungul Singh* vs. *Mohun Ram Marwaree*, 12 W. R., 397. If the award has not been filed, it is doubtful if a decree can be given—*Himutoollah Chowdhry* vs. *Bebee Heerun*, 13 W. R., 62; but where a decree passed by the Court of first instance was set aside on the ground that the award had not been filed, the Appellate Court was considered to have erred, as the award had not been impugned as corrupt or partial—*Ahmed* vs. *Mussamut Ameen Bebee*, S. D., N. W., 1861, p. 221.

An application that an award be remitted to the arbitrators in order that the proceedings, depositions and exhibits in the suit which have not been submitted with it to the Court under this section, should be so submitted, must be made within ten days after the award has been filed—*Baney Madhub Roy* vs. *Hurry Mohun Roy*, 2 Ind. Jur., N. S., 16. The arbitrator should not allow documents entrusted to him by the Court to be removed from the record—*Maharajah Sir Joy Mungul Singh* vs. *Mohun Ram Marwaree* 12 W. R., 397.

Arbitrators or umpire may state special case.

517. Upon any reference by an order of the Court, the arbitrators or umpire may, with the consent of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court; and the Court shall deliver its opinion thereon; and such opinion shall be added to and form part of the award.

This section applies to H. C. and M. S. C. C.

The Court has no power to sanction a rule made by the arbitrators, making the payment of their fees a condition precedent to their hearing the reference—*Robarts* vs. *Steel*, 8 C. L. R., 439.

Court may, on application, modify or correct award in certain cases.

518. The Court may, by order, modify or correct an award,

(*a*) Where it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred, or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision.

This section applies to H. C. and M. S. C. C.

In cases under this chapter, no matter not in issue before the Court can properly become the subject of arbitration or award—*Chowdhree Hubeeboollah* vs. *Sahoo Dowlut Ram*, S. D., N. W., 1849, p. 229. The arbitrators should confine their enquiry, and the evidence, to the matters referred—*Krishna Kanta Paramanick* vs. *Bidya Sundari Dasi*, 2 B. L. R. App., 25; since an award on a matter not referred is null and void—*Moshahet Singh* vs. *Konomutty Bewa*, 15 W. R., 172; and as regards any excess the irregularity must be dealt with by the Court under this section, or by remitting the award under section 520, *post*, unless the parties agree to accept the awards as it stands—*Dabre Dass* vs. *Sheo Buksh*, S. D., N. W., 1861, p. 68. Where certain points have been referred by the Judge, and others by the parties themselves, separate awards should be given instead of mixing them all up and giving one general award—*Roghoo Nundun Lall Sahoo* vs. *Bunwaree Lal Sahoo*, 3 W. R., Mis., 27.

An appeal lies from orders under this section—see section 588, *post*. As to the effect of not rectifying an error see—*Nazir Moowzoorad* vs. *Mehedi Begum*, 7 C. L. R., 206.

Order as to costs of arbitration.

519. The Court may also make such order as it thinks fit respecting the costs of the arbitration, if any question arise respecting such costs and the award contain no sufficient provision concerning them.

This section applies to H. C. and M. S. C. C.

No appeal lies from an order under this section, though an appeal does lie from an order under section 518. It would seem as if the question of costs was left wholly to the discretion of the Court. Where all matters in difference between the parties in the suit were referred to arbitration under an order of Court: *Held*, that the arbitration had power to award interest after the date of the submission, and to deal with the costs of the reference and award—*Mohanlall* vs. *Nathuram*, 1 B. L. R., 144.

When award or matter referred to arbitration may be remitted.

520. The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrators or umpire, upon such terms as it thinks fit,

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration;

(*b*) where the award is so indefinite as to be incapable of execution;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

This section applies to H. C. and M. S. C. C.

The Court cannot go behind the award and give something not allowed by it—*Gopal Chunder Roy* vs. *Brojendro Coomar Roy*, 5 C. L. R., 338; and it must construe an award by the language of the award itself, and not by the oral evidence of the arbitrators—*Mussumut Guneshee* vs. *Chotay Lal*, 3 Alla., 117. If on a perusal of the award and the record it finds that the arbitrators have fallen into such mistakes or omissions as cannot be amended under the last section, it must return the award for reconsideration—*Mohun Kishen* vs. *Bhoobun Shyam*, 7 W. R., 406. The Court cannot decide such matters of its own motion—*Doorgunje Singh* vs. *Nypaul Singh*, S. D., N. W., 1864, p. 212; *Luchmee Narain* vs. *Pyle*, 2 Alla., 150. On the other hand the Court should be careful not to remit a case unnecessarily—*Taramath Chowdhry* vs. *Manick Chunder Doss*, 14 W. R., 469.

A suit having been referred to arbitration was dismissed by the arbitrators for default; whereupon the plaintiff objected to the award and charged the arbitrators with collusion. The Judge, finding that the charge was not made out, referred the matter back to the arbitrators for a proper award: *Held*, that the plaintiff's revocation of his consent to the reference did not put an end to the arbitrator's power—*Mussamut Ablakhee Kooer* vs. *Oodun Singh*, 15 W. R., 331.

(*a*) If under a general reference the arbitrators give costs, but omit to state the scale—*Barrut Chunder Doss* vs. *Damjee Pittumber*, Coryton, 150; or omit to give interest, the award should be remitted—*Phiran* vs. *Bahoran*, 7 Alla., 367.

(*c*) An award cannot be remitted under this section unless the illegality is apparent on the face of it—*Nanak Chand* vs. *Ram Narayan*, I. L. R., 2 Alla., 181; and though, apparently inconsistent on the face of it, it should be decreed if the parties agree—*Kesree* vs. *Munsook Roy*, S. D., N. W., 1861, p. 224; but if illegal or defective on its face, it should be at once remitted—*Luchmee Narain* vs. *Pyle*, 2 Alla., 150.

Where plaintiff and one of three defendants submitted their dispute to arbitration. *Held*, the award was not void as between them, because the other defendants had not joined in submitting the case to arbitration—*Beshoka Dasia* vs. *Anunto Lall Pani*, 4 C. L. R., 65.

Where the plaintiff in a referred case agreed to abide by the oath of the defendant (given on an idol) and an award was made accordingly. *Held*, the award was good—*Bhagirath* vs. *Ram Ghulam*, I. L. R., 4 Alla., 283; but all the parties must join in the agreement—*Lekhraj Singh* vs. *Dulhma Kuar*, I. L. R., 4 Alla., 302.

Grounds for setting aside award.

521. An award remitted under section 520 becomes void on the refusal of the arbitrators or umpire to reconsider it. But no award shall be set aside except on one of the following grounds (namely)—

(*a*) corruption or misconduct of the arbitrator or umpire;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit;

and no award shall be valid unless made within the period allowed by the Court.

This section applies to H. C. and M. S. C. C.

An award remitted becomes void if the arbitrators or umpire refuses to reconsider it, without any proof of corruption or misconduct—*Mohun Kishen* vs. *Bhoobun Shyam*, 7 W. R., 406; *Deb Narain Singh* vs. *Rajmonee Koonwur*, 3 W. R., 168.

(*a*.) Corruption or misconduct of the arbitrator or umpire is necessary, and when any such charge is made, the Court should look carefully over the record—*Pureshnath Dey* vs. *Nobin Chunder Dutt*, 12 W. R., 93; *Bykunt Nath Mookerjee* vs. *Prionath Ghose*, 22 W. R., 147; and make a full enquiry—*Sanuk Kachee* vs. *Oree Doobey*, 2 Alla., 241. Apparent partiality on the ground that one of the arbitrators is a relative of one side—*Bykunt Nath Ghose* vs. *Prionath Ghose*, 22 W. R., 447; *Zoravur Singh* vs. *Kessree Singh*, S. D., N. W., 1864, p. 15; *Ram Buksh* vs. *Gunga Pershaud*, S. D., N. W., 1851, p. 201 [but see case at 12 W. R., 93]; that they had tendered their resignation, if they had withdrawn it before it was accepted—*Maharajah Sir Joy Mungul Singh* vs. *Mohun Ram Tewaree*, 23 W. R., 429; that they had decided without sufficient enquiry—*Parus Dass* vs. *Khoobee*, S. D., N. W., 1861, p. 199; that their investigation was defective—*Soda Ram* vs. *Behuree*, S. D., N. W., 1864, p. 399; or that, though they had awarded damages to plaintiff, they made him pay costs—*Mohendronath Bose* vs. *Nussee Manjee*, 1 Ind. Jur., N. S., 224; or that their award is erroneous—*Kazee Syud Nazer Ali* vs. *Mussamut Tinoo Dossia*, 6 W. R., 95; or that they decided the case against the written statement of the defendant—*Gooroo Churn Dey* vs. *Ram Dhun Pal*, 7 W. R., 28; or that they received and decided the case on what was not legal evidence—*Reedoy Kristo Mujomdar* vs. *Puddo Lochun Mujomdar*, 1 W. R., 12; *Howard* vs. *Wilson*, I. L. R., 4 Cal., 231; or that the arbitrator awarded plaintiff damages, and yet made him pay all the costs—*Mohendronath Bose* vs. *Nussee Manjee*, 1 Ind. Jur., N. S., 224; or the mere circumstance that the arbitrators had some interest in the subject-matter of the suit—*Sanuk Kashee* vs. *Oree Doobey*, 2 Alla., 241;

or that one of the parties, through the fault of his agent, had no knowledge of the proceedings—*Mackenzie* vs. *Hume*, 1 Tay. and Bell, 41; is insufficient to set aside an award. But where one of the arbitrators who never attended or took any interest in the proceedings, signed the award—*Ram Guttee Mundul* vs. *Thakoor Doss Mundul*, 22 W. R., 418; *Sreenath Ghose* vs. *Raj Chunder Paul*, 8 W. R., 171, and where the arbitrators improperly added another to their number—*Phiran* vs. *Bahiran*, 7 Alla., 367; the awards were set aside. It is the duty of all the arbitrators to attend every meeting which takes place, and they ought all to act together in every stage of the proceedings—*Sree Nath Ghose* vs. *Raj Chunder Paul*, 8. W. R., 171.

If a person is in a fit condition to manage his affairs down to the time when the proceedings before the arbitrator concluded, the award is not invalid because he became insane before its publication—*Goureenath* vs. *Collector of Monghyr*, 7 W. R., 5.

An award has no effect so long as there is a judicial order setting it aside—*Fitzpatrick* vs. *Macnaghten*, 21 W. R., 261.

Appeal.—No appeal lies under section 588 *post*, from an order setting aside an award, but where a Judge refused to give judgment on an award, it was held that the refusal was a judgment on the subject-matter of the suit and appealable—*Howard* vs. *Wilson*, I. L. R., 4 Cal., 231; and if a Court, having set aside an award, hears the case on the merits, it is open to any party appealing from the decree to impugn the order—*Mothooranath Tewaree* vs. *Brindabun Tewaree*, 14 W. R., 327.

If the arbitrators refuse to revise the award, the propriety of remitting the case may be attacked in appeal—*Abdul Rahmun* vs. *Yar Mahomed*, I. L. R., 3 Alla., 636.

Judgment to be according to award.

522 If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application,

the Court shall, after the time for making such application has expired, proceed to give judgment according to the award,

or, if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Decree to follow.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award

This section applies to H. C. and M. S. C. C.

The period of limitation for an application under this section is ten days—Act XV of 1877, Sch. II, Art. 158; and judgment should not be delivered until the ten days have expired—*Baboo Gokul Dass* vs. *Baboo Balmokunk*, S. D., N. W., 1864, p. 250; *Gunga Narain Ghose* vs. *Ram Chund Ghose*, 20 W. R., 311; unless the parties expressly consent—*Sunt Lall* vs. *Babboojee*, S. D., N. W., 1863, p. 42. Under Act VIII an appeal lay from such a judgment—*Gokul Dass* vs. *Baboo Balmokund*, S. D., N. W., 1864, p. 250; *Misr Deo Kishun* vs. *Misr Bhugwan Doss*, 3 Agra, 199; *Phiran* vs. *Bahoran*, 7 Alla., 367; but possibly the expiration of the ten days might be looked on as a condition precedent to exercising jurisdiction, so as to render the Judge's action subject to be controlled under the Charter Act. See *Moharajah Sir Joy Mungul Singh*, 12 W. R., 397.

A party impugning an award and seeking to set it aside is not bound to contest the proceedings step by step, and appeal against every interlocutory order. He may advance all his objections when the award is delivered—*Sheonath* vs. *Ramnath*, 5 W. R., P. C., 21. But he should be careful to bring to the notice of the Court within the ten days any objection he may have to urge or any defect he may perceive—*Baney Madhub Roy* vs. *Hurrymohun Roy*, 2. Ind Jur., N. S., 16; otherwise the Court may enter judgment in terms of the award, and if so, it will be final—*Sashti Charn Chatterjee* vs. *aruck Chunder Chatterjee*, 8 B. L. R., 315; *Protap Chunder Roodro* vs. *Huro Monee Dossia*, 24 W. R., 188; 15 W. R., F. B., 9; *Maharajah Joy Mungul Singh* vs. *Mohun Ram Marwaree*, 23 W. R., 429; even though the arbitrators have been guilty of misconduct—*Ramonoogra Chobey* vs. *Mussamut Putmorta Chobayan*, 7 W. R., 205; *Sree Nath Ghose* vs. *Rajchunder Paul*, 8 W. R., 171; or the award is clearly defective and illegal—In the matter of the petition of

Ilahi Bux, 5 B. L. R. App., 75 ; or even though the judgment does not embody a suggestion of the majority of the arbitrators which was mere surplusage - *Surboree Kant Bhuttacharjee* vs. *Anadya Kant Bhuttacharjee*, 20 W. R., 226 ; and the matter cannot be remanded to the arbitrators—*Pokkher Pershad* vs. *Punchum Rae*, 2 Alla., 235.

Appeal.—The finality follows the award, and though a trifling addition may not affect the decree—*Huro Soonduree Debee* vs. *Sreedhnr Bhuttacharjee*, 17 W. R., 352 ; the general rule is that a decree which does not strictly follow the award is applicable. So that if there is no final award—*Boonjad Mathoor* vs. *Nathoo Sahoo*, I. L. R., 3 Cal., 375, or an award with suggestions, and the decree does not follow the award exclusive of the surplusage suggestions—*Surboree Kant Bhuttacharjee* vs. *Anadya Kant Bhuttacharjee*, 20 W. R., 226 ; or has been passed on a special case under para. 3—*Ram Bhungun Bhuggut* vs. *Sree Kishen Bhuggut*, 2 B. L. R., 260 ; 11 W. R., 140 (but see section 517) ; or if it give interest which the arbitrators have not awarded—*Mohun Lall Shaha Chowdhry* vs. *Joynarain Shaha Chowdhry*, 23 W. R., 105 ; an appeal will lie. And where the Munsiff discussed the evidence and delivered a judgment on the merits which coincided with the award : *Held* that the judgment was not according to the award, and that an appeal lay—*Gunga Nararin Ghose* vs. *Ram Chand Ghose*, 20 W. R., 311 ; 12 B. L. R., 48. See for an explanation of this case—*Wazir Mahton*, vs. *Lulit Singh*, I. L. R., 7 Cal., 166. See also *Deb Narain Singh* vs. *Rajmonee Koonwur*, 3 W. R., 168 ; *Ram Bhunjun Bhuggut* vs. *SreeKishen Bhuggut*, 11 W. R., 140 ; *Lalla Ishuree Pershad* vs. *Hur Bhunjun Tewaree*, 15 W. R., F. B., 9.

It has been held that the finality allowed to a decree passed under Act VIII, only refers to the decree of the first Court, and where a Judge improperly admits an appeal from an order refusing to uphold an award, a special appeal lies to the High Court—*Pureshnath Dey* vs. *Nobin Chunder Dutt*, 12 W. R., 93 ; and though no appeal will lie from a judgment passed according to the award, an appeal will lie from orders passed in execution, under section 244, *ante*—*Himutoollah Chowdhry* vs. *Bibee Heerun*, 13 W. R., 62.

Agreement to refer to arbitration may be filed in Court.

523. When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

Application to be numbered and registered.

The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

Notice to shew cause against filing.

On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator when he is not named therein and the parties cannot agree as to the nomination.

This section applies to H. C.

An agreement to refer an existing dispute to arbitration is binding and capable of enforcement, like any other lawful agreement, and submission once made is not revocable without just cause—*Nagasawmy Naik* vs. *Rungasawmy Naik*, 8 Mad., 46; *Pestonjee Nusserwanjee* vs. *Manickjee*, 3 Mad., 183; 12 Moore, 112; *Ram Coomar Shaha* vs. *Kalachand Shaha*, 21 W. R., 395; *Alla Aiyappa* vs. *Nundula Peraiya*, 3 Mad., 82

Where in a reference made, the arbitrators were empowered to make a partition, a power to sale was omitted. *Held* on the award being made a rule of Court, that the Court had no power to order the sale of certain property which the arbitrators could not decide and recommended to be sold—*Chumimony Dossee* vs. *Nistarinee Dossee*, 3 C. L. R., 357.

When Court will not order agreement to be filed.—Where parties had executed a deed agreeing to refer all matters in dispute, to the arbitration of three persons, and one of the arbitrators refused to continue to act and the other two consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in Court—*Brooke* vs. *Surdyal*, 12 B. L. R., App., 13; and when parties to a suit as well as these not engaged in the litigation agree to refer all their dispute to arbitration, the award should be filed although the litigation is pending—*Harrivallab Das* vs. *Titam Chand*, I. L. R., 4 Bom., 1.

As to an agreement to refer future dispute to an arbitrator, see *Re Wilcox and Storkey*, L. R., 1 C. P., 671.

An order disallowing the application or ordering the agreement to be filed is not open to appeal—*Bhugwan* vs. *Purmeshree*, 5 Alla., 179; *Pestonjee Nusserwanjee* vs. *Manickjee*, 3 Mad., 183.

As to an agreement to refer to a foreign tribunal, see *Law* vs. *Garrett*, 8 Ch. Div., 26.

Provisions of chapter applicable to proceedings under order of reference.

524. The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under section 523, and to the award of arbitration and to the enforcement of the decree founded thereupon.

This section applies to H. C.

Filing award in matter referred to arbitration without intervention of Court.

525. When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

Application to be numbered and registered.

The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Notice to parties to arbitration.

The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

This section applies to H. C.

A Subordinate Judge invested with the jurisdiction of a Court of Small Causes can file an award—*Balkrishna* vs. *Lakshman*, I. L. R., 3 Bom., 219.

This section is not imperative upon a person who seeks to enforce his award. He may do so in a regular suit—*Palaniappa Chetti* vs. *Rayappa Chetti*, 4 Mad., 119.

In order to set the Court in motion, there must have been a reference to arbitration and an award made—*Sustee Churn Chuckerbutty* vs. *Taruck Chunder Chatterjee*, 15 W. R., F. B., 9; and when this is so, not merely a party to the award, but any person interested in it can apply [within six months from the date of the award—article 176, schedule II, Act XV., 1877—not the date written in it, but the date it was handed over to the parties—*Sreenath Chatterjee* vs. *Kylash Chunder Chatterjee*, 21 W. R., 248;] by a petition duly verified, and issue notice calling on the parties to the arbitration to show cause why the award should not be filed.

The arbitration award should be filed with the application—*Himutoollah Chowdhry* vs. *Bibee Heerun*, 13 W. R., 61; and if the agreement to arbitrate provides that the award may be delivered bit by bit, each portion decided may be dealt with as a separate award under this section—*Shoshemukhi Dabia* vs. *Nobin Chunder Roy*, 4 C. L. R., 92; the application may be made without any valuation of suit—*Khoda Buksh* vs. *Mowla Buksh*, 14 W. R., 255. The Court in which the application is made must have jurisdiction over the whole matter of the award, and if the value of the subject-matter is greater than the money limit of the Court's jurisdiction—*Gangappa* vs. *Kapnappa*, 5 Mad., 128; ex-parte *Balkrishna* vs. *Bhashgar Gupte*, 2 Bom., 91; or is from its nature not a matter of which the Court can take cognizance, the application should be returned—*Altaf Hossein* vs. *Grish Chunder Roy*, 15 W. R., 556; *Mackilligan* vs. *Ram Tonoo Bhoomick*, 10 W. R., 83; *Shoshee Mohun Shaha* vs. *Aheer Sircar*, 5 W. R., Act X, 13.

A and B entered into partnership for the purpose of carrying on a tea garden at Darjeeling. The partnership deed was executed in Calcutta; but both parties resided out of jurisdiction. The deed contained provisions for reference to arbitration in case of dispute in matters relating to the partnership. Disputes having arisen arbitrators were appointed in accordance with the terms of the deed, and they subsequently made their award in Calcutta to the following effect: that B's share in the partnership property should stand charged with the payment of a certain sum found to be due by him to the plaintiff A; that B should execute mortgage to him as security for payment, and that the tea garden should be sold in Calcutta. In an application under section 327, Act VIII of 1859, to file the award: *Held*, that the High Court at Calcutta had jurisdiction; that the award might be filed in any Court in which a suit in respect of the subject-matter of the award might be instituted, and as, by reason of the execution of the deed of partnership part of the cause of action arise in Calcutta, such a suit could be instituted with the leave of the Court—*Kellie* vs. *Fraser*, I. L. R., 2 Cal., 445.

Parties may submit matters pending in a suit, with other matters, for arbitration and determination under this section—*Thackoordass Roy* vs. *Hurrydass Roy*, W. R., 1864, Mis., 21; *Harivalabdas Kaliandas* vs. *Utamchand Manickchand*, I. L. R., 4 Bom., 1.

Shew Cause.—In *Sreeram Chowdhry* vs. *Denobundhoo Chowdhry*, 9 C. L. R. 147, Pontixfen J., intimated an opinion "that it was not intended that an award should be filed under section 525, if either of the parties to the reference showed cause against it by affidavit or verified petition, within the provisions of sections 520 and 521. In such cases, I think it would be the duty of the Court, without inquiring into the validity of the cause so shewn, to refuse the application to file the award and to leave the applicant to his remedy by suit, having regard to the fact that the Court has no power to deal with the award under section 518, or to take action by remitting the award under section 520." But in the case of *Dandekar Dankedass*, I. L. R., 6 Bom., 663; the High Court of Bombay refused to follow this expression of opinion. This decision of the Bombay Court has been followed by a divisional Bench of the Calcutta High Court.

A Magistrate directed parties in a criminal case to submit the matter in dispute to arbitration, and they did so. It was held that his action was recommendatory, not judicial, and the award could be enforced under this section—*Sheo Nund Rai* vs. *Maha Nund Rai*, 2 Agra, F. B., 45.

Although an award declaring that the parties should have separate possession of certain portions of an estate, that their names should be separately recorded, and that each should pay the revenue on the portions allotted to him is not enforceable as regards the registration of names in the revenue records or the payment of the Government revenue, yet the Court may enforce it as between the parties and give them separate possession, leaving them to make their own application to the revenue authorities in respect of the other matters involved—*Kashi Ram* vs. *Dhun Sing*, S. D.. N. W., 1856, p. 519. The Civil Courts have no jurisdiction to enforce an arbitration award concerniug a claim for moneys collected by defendaut as tehsildar. Such a claim is cognizable under section 24, Act X of 1859—*Shoshee Mohun Shaha* vs. *Aheer Sircar*, 5 W. R., Act X. 13.

Filing and enforcement of such award.

526. If no ground such as is mentioned or referred to in section 520 or section 521, be shewn against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter.

This section applies to H. C.

Section 327 of Act VIII was not incorporated with the earlier sections of chapter VI, and awards were not filed if there was any substantial objection which appeared on the face of the award or was founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or any other ground fatal to an award according to English law—*Chowdhri Murtazha Hossein* vs. *Mussamut Bechunnissa*, L. R., 3 Ind. App., 213. Now the Court has no power to refuse to file an award, unless no one or other of the grounds referred to in section 520, 521.

A person cannot revoke a submission to arbitration without just and sufficient cause—*Nagaswamy Naik* vs. *Rungasamy Naik*, 8 Mad., 46. Mere revocation does not bar the filing of an award—*Santaya* vs. *Ramaraya*, 7 Mad., 257; but if the whole award is not tendered—*Rajchunder Roy Chowdhry* vs. *Brojendra Coomar Roy*, 21 W. R., 182; or the arbitrators have been guilty of misconduct—*Nader Ali* vs. *Majoo*, 21 W. R., 377; the award should not be filed. If the award is filed, the Court should then proceed to pass judgment according to the award and draw up a decree—*Himutoola Chowdhry* vs. *Bibee Heerun*, 13 W. R., 62; if the award be rejected, it is not null and void, and the applicant can sue to enforce it in a regular suit—*Kota Seetamma* vs. *Kolipurla Soobbiah*, 8 Mad., 81; *Nursing Gariwan* vs. *Puttoo Ostagur*, 20 W. R., 420, and the cases cited.

Appeal does not lie.—No appeal lies from an order refusing to file an award —*Sreeram Chowdhry* vs. *Dinobundhoo Chowdhry*, 9. C. L R., 147; I. L. R., 7 Cal., 490; *Baboo Chintamun Singh* vs. *Mussamut Uma Kunwar*, B. L. R., F. B. R., 505; not made in the course of a suit —*Howard* vs. *Wilson*, I. L. R., 4 Cal., 231; even though the order awards costs—*Preonath Chowdhry* vs. *Ramdhun*, 11 W. R., 104; but see *Raj Chunder Roy Chowdhry* vs. *Brojendra Coomar Roy*, 21 W. R., 182; and no appeal is given by the Code from an order directing an award to be filed—section 588; *Sham Lall Doobey* vs. *Ruboowa Misser*, S. D., N. W., 1868, p. 1178; *Ramdhan* vs. *Mahesh*, I. L. R., 2 Alla., 471; the party should however ask the Court to give judgment according to the award and decree to follow it—*Ramadhan* vs. *Ganesh*, I. L. R., 4 Alla., 239; and the decree passed is final—section 522; *Sreenath Chatterjee* vs. *Kylash Chunder Chatterjee*, 21 W. R., 248; *Wazir Mahton* vs. *Lulit Singh*, I. L. R., 7 Cal., 166; *Vishnu Bhau Joshi* vs. *Ravji*, I. L. R., 3 Bom., 18; *Wazir Mahton* vs. *Lubt Singh*, 8 C. L. P., 505; it was otherwise in Bombay—*Laksman Shevaji* vs. *Rama Esu*, 8 Bom., 17; but a party may appeal on the ground that the decree is in excess of, or not in accordance with, the award—section 522; or on the ground that no award had been made—*Sashti Churn Chatterjee* vs. *Tarak Chandra Chatterjee*, 8 B. L. R., 315; *Runyad Mahton* vs. *Nathoo Sahoo*, 1 C. L. R., 455; or that the award is partly beyond the terms of the submission—*Mana Vikrama* vs. *Mallochery*, I. L. R., 3 Mad., 18; *Sddik* vs. *Indad*, I. L. R., 3 Alla., 384; or that the proceedings were so irregular that no judgment could be passed under this section—*Boonjad Mathoor* vs. *Nathoo Shahoo*, I. L. R., 3 Cal., 376; *Wazir Mahton* vs. *Lulit Singh*, I. L. R., 7 Cal., 166; or on the ground that the judgment has decided a question of fact not determined by the award—*Rambhunjun Bhakat* vs. *Srikishen Bhakat*, 2 B. L. R., 260; 11 W. R., 140; and if for any reason the decision is not final and if an appeal is allowed all the Appellate Court can do is to remand the case for disposal on the merits—*Wazir Mahton* vs. *Lulit Singh*, I. L. R., 7 Cal., 166; but the mere fact that one of the parties had not time to show cause against the award is not sufficient to support an appeal—*Monji Prenji* vs. *Maliyakeb*, I. L. R., 3 Mad., 59. The High Court can however interfere under section 622 *post*—*Mana* vs. *Mallicherry*, I. L. R., 3 Mad., 68.

Appeal lies.—Appeals lie from decisions passed in execution of the decree in the usual manner—*Vasudeb Vishnu* vs. *Narayan Jagannath Dekshit*, 5 Bom., 129; *Himutoollah Chowdhry* vs. *Bibe Heerun*, 13 W. R., 62; on a full stamp—*Wolee Alum* vs. *Bebee Misrun*, 12 W. R., 50. Under Act VIII, an appeal was formerly allowed where want of consent was alleged—*Hulodhur Sungiree* vs. *Gunesh Sonthal*, 6 W. R., 60; and on the question of costs—*Khoda Buksh* vs. *Moula Buksh*, 14 W. R., 255. No appeal seems to lie on either grounds now. Certainly no appeal is given from costs under section 519.

CHAPTER XXXVIII.

OF PROCEEDINGS ON AGREEMENT OF PARTIES.

Power to state case for Court's opinion.

527. Parties claiming to be interested in the decision of any question of fact or law, may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,

(*a*) a sum of money fixed by the parties or to be determined by the Court, shall be paid by one of the parties to the other of them; or

(*b*) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(*c*) one or more of the parties shall do, or refrain from doing some other particular act specified in the agreement.

Every case stated under this section shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the question raised thereby.

This section applies to H. C. and M. S. C. C.

When value of subject-matter must be stated.

528. If the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

This section applies to H. C. and M. S. C. C.

Agreement to be filed and numbered as suit.

529. The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested, as plaintiff or plaintiffs, and the other or others of them as defendant or defendants; and notice shall be given to all the parties to the agreement other than the party or parties by whom it was presented.

This section applies to H. C. and M. S. C. C.

Parties to be subject to Court's jurisdiction.

530. When the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court, and shall be bound by the statements contained therein.

This section applies to H. C. and M. S. C. C.

No amendment can be made for the purpose of raising fresh points, or adding to or altering the facts, except with consent—*Mersey Dock Trustees* vs. *Jones*, 8 C. B., N. S., 124 : 29 L. J., C. P., 239.

Hearing and disposal of case.

531. The case shall be set down for hearing as a suit instituted under Chapter V, the provisions of which shall apply to such suit so far as the same are applicable.

If the Court is satisfied, after an examination of the parties, or after taking such evidence as it thinks fit,

(*a*) that the agreement was duly executed by them, and

(*b*) that they have a *bonâ fide* interest in the question stated therein, and

(*c*) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so given a decree shall follow and shall be enforced in the manner provided in this Code for the execution of decrees.

This section applies to H. C. and M. S. C. C.

The Court will not proceed if it appears that there is no matter really in controversy between the parties—*Deo* vs. *Dunrse*, 6 C. B., 100.

CHAPTER XXXIX.

ON SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

As to how far the other provisions of the Code may apply to proceedings under this chapter, see *Smith & others* vs. *Richardson*, 4 C. P. Div., 112.

Institution of summary suits upon bills of exchange, &c.

532. In any Court to which this section applies all suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed under this chapter, be instituted by presenting a plaint in the form prescribed by this Code; but the summons shall be in the form contained in the fourth schedule hereto annexed, No. 172, or in such other form as the High Court may from time to time prescribe.

In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter mentioned so to appear and defend;

and in default of his obtaining such leave or of appearance and defence in pursuance thereof, the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by a rule of the High Court, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be enforced forthwith.

Payment into Court of sum mentioned in summons.

The defendant shall not be required to pay into Court the sum mentioned in the summons, or to give security therefor, unless the Court thinks his defence not to be *primâ facie* sustainable, or feels reasonable doubt as to its good faith.

Explanation.—This section is not confined to cases in which the bill, hundi or note sued upon, together with mere lapse of time, is sufficient to establish a *primâ facie* right to recover.

This section applies to the Courts mentioned in section 538.

Suits under this chapter must be brought within six months from the time the instrument sued on becomes due and payable—Act XV, 1877, Schedule II, Art. 3.

It applies to defendants not residing within jurisdiction—*Chundra Kant Roy* vs. *Pogose*, 3 B. L. R., 83. In Calcutta the sums must be beyond the cognizance of the Small Cause Court, (section 538.) See *Duff* vs. *Fisher*, 8 B. L. R., App., 10.

The summons is in the form contained in No. 172, or in such form as the High Court may prescribe. The form in No. 172, compels the defendants to shew cause within ten days. It has been held that the High Court can extend this time and 28 days have been allowed in a summons issued for service in Peshawar—*Groom* vs. *Wilson*, I. L. R., 3 Cal., 539. If the defendant is at such a distance as we make it impossible for him to appear in ten days, the Court will stay execution for a time long enough to enable him to appear under section 534, post—*Chandra Kant Roy* vs. *Pogose*, 3 B. L. R., (O. C.) 83; but see *Govt.* vs. *Palmer*, 1 Ind. Jur., (N. S.) 395.

Plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is legally demandable on the instrument—*Desouza* vs. *Rangaran*, 6 Mad., 257. Under Act V care was taken not to admit a suit under the summary procedure unless it was clearly within the Act. Thus where a plaint and note were presented under section 2 and the note was endorsed "received for the Chartered Mercantile Bank, James Reid, Agent," and the endorsement was struck out, the Court refused to admit the plaint, as under the summary procedure no evidence could be taken, and the plaint could not be admitted unless it was proved how the endorsement had been struck out—the *Chartered Mercantile Bank* vs. *Seconde*, 3 B. L. R., App., 146. See also *Remfry* vs. *Shillingford*, I. L. R., 1 Cal., 130. Such evidence would be admissible now. See the explanation to the section.

A hoondee which contains a direction on sufficient consideration to the drawee and accepted by him is within the Act—*The East India Bank* vs. *Khajah Vallie Goolwany*, 1 Ind. Jur., N. S., 247.

By section 13, Act V, 1866, a protest of a bill of exchange, inland or foreign, when purporting to be made by a notary public is *primâ facie* evidence that the bill has been dishonored.

Defendant shewing defence on merits to have leave to appear.

533. The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon the defendant paying into Court the sum mentioned in the summons,

or upon affidavits satisfactory to the Court, which disclose a defence or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application, and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit.

The section applies to the Courts mentioned in section 538.

After the usual return of service, and the expiration of the period mentioned in the summons, an order of the Court for a decree should be obtained—*Schiller* vs. *Marker*, 1 Ind. Jur., N. S., 283.

If the defendant appears and discloses any defence, legal or equitable, he will be allowed to appear and defend—*Casella* vs. *Darton*, L. R., 8 C. P., 100; but where there is reason to doubt its *bonâ fides*, the condition of paying the money into Court, or bringing in security will be imposed—*Agra Masterman's Bank* vs. *Leighton*, L. R., 2 Ex., 56; *Ram Lal Mookerjee* vs. *Haran Chandra Dhar*, 3 B. L. R., 130; and where a conditional order is passed, but the condition is not performed, the order is a nullity and subsequent steps to set it aside are unnecessary—*Gourdass Mistry* vs. *Hewitt*, Fulton, 18. Leave to appear may be granted *ex-parte*; but the plaintiff can shew by affidavit that the leave ought not to have been granted, or, if granted at all, granted on more stringent terms—*Vonlintzgy* vs. *Narayan Singh*, 6 B. L. R. App., 64.

In giving leave to defend, the Court has a discretion to order security for costs not only where there is a doubt as to the *bonâ fides* of the defence, but also where it appears unnecessary though allowable—*Vonlintzgy* vs. *Narayan Singh*, 6 B. L. R. App., 64.

Power to set aside decree.

534. After decree, the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to appear to the summons and to defend the suit, if it seem reasonable to the Court so to do, and on such terms as the Court thinks fit.

This section applies to the Courts mentioned in section 538.

Irregular service of summons on two, out of three, defendants to an action brought on a joint promissory note, does not give the defendant properly served any ground to question the decree passed against him—*Ewing & Co.* vs. *Gasai Dass Ghose*, 3 B. L. R., 7.

Appeal.—An appeal lies from an order refusing to set aside an *ex-parte* decree—*Luckmidas* vs. *Ebrahim*, I. L. R., 2 Bom., 544. See however *Lal Singh* vs. *Kunjan*, I. L. R., 4 Alla., 387.

Power to order bill, &c., to be deposited with officer of Court.

535. In any proceeding under this chapter the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Act V, 1866, section 5. This section applies to the Courts mentioned section 538.

Recovery of cost of noting non-acceptance of dishonoured bill or note.

536. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-accept-

ance or non-payment, or otherwise, by reason of such dishonour, as he has under this chapter for the recovery of the amount of such bill or note.

This section applies to the Courts mentioned in section 538.

Noting is a minute made on the bill by a notary at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year and his charges for minuting—Byles, 9th Ed., 251. As to the word "otherwise" see Lush's Practice, p. 1,031.

Procedure in suits under this chapter.

537. Except as provided by sections 532 to 536 (both inclusive), the procedure in suits under this chapter shall be the same as the procedure in suits instituted under Chapter V.

Application of chapter.

538. Sections 532 to 537 (both inclusive) apply only to—

(*a*) the High Courts of Judicature at Fort William, Madras and Bombay;

(*b*) the Court of the Recorder of Rangoon;

(*c*) the Courts of Small Causes in Calcutta, Madras and Bombay;

(*d*) the Court of the Judge of Karachi; and

(*e*) any other Court having ordinary original civil jurisdiction to which the Local Government may, by notification in the official Gazette, apply them.

In case of such application the Local Government may direct by whom any of the powers and duties incident to the provisions so applied shall be exercised and performed, and make any rules which it thinks requisite for carrying into operation the provisions so applied.

Within one month after such notification has been published, such provisions shall apply accordingly, and the rules so made shall have the force of law.

The Local Government may, from time to time, alter or cancel any such notification.

CHAPTER XL.

OF SUITS RELATING TO PUBLIC CHARITIES.

When suits relating to public charities may be brought.

539. In case of any alleged breach of any express or constructive trusts created for public charitable or religious purposes, or whenever the direction of the Court is deemed

necessary for the administration of any such trust, the Advocate-General acting *ex-officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(*a*) appointing new trustees under the trust;

(*b*) vesting any property in the trustees under the trust;

(*c*) declaring the proportions in which its objects are entitled;

(*d*) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged;

(*e*) settling a scheme for its management;

or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Act No. X of 1840, section two, is hereby repealed.

This section applies to H. C.

"*Persons having a direct interest*:"—See *Jan Ali* vs. *Atawar Ruhmun*, 9 C. L. R., 433.

As to the difference between this section and section 339 Act X of 1877 see—*Karuppa* vs. *Asamuga*, I. L. R., 5 Mad., 383.

This section does not affect those special cases connected with religious uses in which the right of a private individual to sue has not been repealed by the Code, and any person interested in the proper observance of a religious endowment can sue on behalf of himself and all others interested to have the trust properly administered or any breach of trust that may have occurred, rectified—*Kali Churn Giri* vs. *Golabi*, 2 C. L. R., 129; *Rup Narain Singh* vs. *Junko Bye*, 3 C. L. R., 113; *Radhabai* vs. *Chimnaji*, I. L. R., 3 Bom., 27; *Panch Cowrie Mull* vs. *Chunnoolal*, I. L. R., 3 Cal., 563, and so can any representative of the person endowing the property—*Brojomohun Doss* vs. *Hurrolall*, I. L. R., 5 Cal., 700.

As to the previous practice in suits relating to charities within the jurisdiction of the Supreme Court, see as to Bombay—*The Wardens of Nossa Senora da Salvacao* vs. *Hartmann*, Perry's O. cases, 338; *Doe Do. Howard* vs. *Pestonji Manickji*, id., 535; *The Advocate-General* vs. *Damochar*, id., 526, and as to Madras—*The Advocate-General* vs. *Brodie*, 4 Moore, 190; as to Calcutta—*Panch Cowrie Mull* vs. *Chunnoolal*, I. L. R., 3 Cal., 563; *Buldeo Dass* vs. *Oodyram*, 2 Tay. and Bell, 56.

By sections 14, 15, 18, Act XX, 1863, any person interested in a religious establishment may, after sanction, sue the officers connected with it for breach of trust. But that Act only applies to special officers while filling their offices—*Sabapathi* vs. *Sabraya*, I. L. R., 2 Mad., 58, in such endowments as had been or might have been under the management of Government by virtue of Reg. XIX of 1810—*Kala Churn Giri* vs. *Golabi*, 2 C. L. R., 128; *Dhurrum Singh* vs. *Kissen Singh*, I. L. R., 7 Cal., 767; *Janali* vs. *Ram Nath Mundul*, I. L. R., 8 Cal., 32; (see, however, *Ganes Singh* vs. *Ram Gopal Singh*, 5 B. L. R., App., 55); and does not apply to a suit by the members of a "Punch" to have certain dedicated property ascertained and licensed—*Panch Cowrie Mull* vs. *Chunnoolal*, 2 C. L. R., 121; nor to a suit by an officer of a religious establishment for dismissal—*Syed Amir Sahib* vs. *Ibrahim Sahib*, 4 Mad., 112; nor to compel the heir of a late manager to make good out of the property inherited by him a sum misappropriated by his father—

Jeyangaru Lavaroo vs. *Durma Dossi*, 4 Mad., 2; its scope is limited to suits charging misfeasance, malversation or neglect of duty—*Agri Sharma Embrandri* vs. *Vishnu Embrandri*. 3 Mad., 198.

Quære, if "public charitable proposes" apply to the *devasthan* of a temple or idol dedicated merely for the purposes of the temple or idol—*Radhabai* vs. *Chunnaji*, I. L. R., 8 Bom., 27.

PART VI.

OF APPEALS.

CHAPTER XLI.

OF APPEALS FROM ORIGINAL DECREES.

Appeal to lie from all original decrees, except when expressly prohibited

540. Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.

This section applies to H. C.

Under the Code the directions of the law as to appeals from orders and from decrees are distinct.

Appeals lie only from the decrees or any part of them and not from the decisions of Courts of original jurisdiction—*Koylas Chunder* vs. *Ram Lall*, I. L. R., 6 Cal., 206; and if a party, wishes to appeal from a particular issue he must have it embodied in the decree—*Niamut Khan* vs. *Phada Buldia*, I. L. R., 6 Cal., 319, see however *Luchman Singh* vs. *Mohan*, I. L. R., 2 Alla., 497. In a suit to recover certain lands by setting aside a *zur-i-peshgi* lease the Judge dismissed the suit, although he found that part of the consideration of the lease was borrowed for necessary purposes. It was held that defendant could not appeal against the finding—*Mussamut Pan Kooer* vs. *Bhugwunt Kooer*, 6 Alla., 19; overruling—*Sheo Golam Singh* vs. *Nursing*, 4 Alla., 120. So where plaintiff sued for a kaboolyat at enhanced rates, and the first Court held defendants were not protected from enhancement but dismissed the suit, the defendant was not allowed to appeal on the question of the right to enhance—*Shama Soonduree Debia* vs. *Digumburee Debia*, 13 W. R., 1; but see *Soroop Chunder Paul* vs. *De Dombal*, 1 W. R., 72. M sued B his tenant holding over, for possession of certain lands. B pleaded a right of occupancy. N and R intervened, claiming adversely to both M and B, and were made parties to the suit. The Court dismissed the suit, because it accepted the title of the intervenors. *Held*, that B could not appeal—*Noubat Rai* vs. *Bagrangi Lal*, 6 Alla., 413.

Decree.—The word "decree" does not include orders either original or appellate upon matters arising in the course of the suit or in execution of decree—Jackson, J.—*Runjit Sing and others* vs. *Meherban Koer*, Sp. Ap. No. 360 of 1877, but does include *ex-parte* decrees and orders made refusing to set them aside—*Luckmidas Vithaldas* vs. *Ebrahim*, I. L. R., 2 Bom., 644; *Modalatha*, I. L. R., 2 Mad., 75; in re *Apuch Ojha*, 4 C. L. R., 18; see however *Lal Singh* vs. *Kunjan*, I. L. R., 4 Alla., 387. See note at p., *ante*.

If a party wishes to make the conduct of the Judge a ground of appeal, he should draw the Judge's attention to the matter by presenting a petition or otherwise—*Ram Koomar Kyburto Dass* vs. *Sonatun Dass*, 3 C. L. R., 23; see however *Jardine* vs. *Turini Mohan Sen*, 8 B. L. R., App., 44.

In execution proceedings the formal order of the Court in which the result of the proceedings is embodied is a decree, and is appealable in all cases in which a decree is appealable, and the procedure must in such cases be governed by the provisions of the chapters which relate to appeals from decrees; clause 1, section 588, seems superfluous—In the matter of *Thakoor Dass Pershad—Pioneer, June 5th.*

To what Court an appeal lies—The Court to which the appeal lies depend on the actual value of the subject-matter in dispute in the original case out of which the contest may have arisen—In the matter of *Duli Chand*, 9 B. L. R., 190; 18 W. R.,

261; *Chunderbhan Singh* vs. *Mahunt Jairam Geer*, 5 Alla., 175; Act VI, 1871, section 22; *Rayasynji Shibsanji* vs. *Gulam Rasul*, 9 Bom., 286; *Aukhil Chunder Sen* vs. *Mohini Mohun Dass*, 4 C. L. R., 441. So also in Madras the appeal is governed not by the value of the proximate subject-matter in dispute, but by the value of the subject-matter in the original suit—*Muthusami Pillai* vs. *Muthuchidambara Cheeti*, 7 Mad., 356; Act III, 1873, section 13.

The decision of the first Court, on the question of valuation is not final for the purpose of determining jurisdiction—*Brojo Coomar Sen* vs. *Eshan Chunder Dass*, 3 C. L. R., 79.

Where an appeal is wrongly preferred to a District Court, the High Court will in special appeal set aside the judgment as made without jurisdiction although neither side objected to the jurisdiction of the Court—*Aukhoy Chunder Sen* vs. *Mohinee Mohun Dass*, 4 C. L. R., 491.

For valuation in a suit for partition, see—*Ragendro Lall Gossami* vs. *Shama Churn Lahoory*, 4 C. L. R., 417.

Who may appeal—No person can appeal unless he is a party to the suit—*Caemmerer* vs. *Birch*, 1 Mad., 8, when decree is passed—*Gokool Pershad Discheet* vs. *Brojo Monee Debia*, 24 W. R., 259; see however *Markham* vs. *Markham*, 16 Ch. Div., 1; and against whom a decree has been given—*Ram Dass Lushkur* vs. *Hureehur Mookerjea*, 23 W. R., 86; see also *ex-parte Ditton*, 11 Ch. Div. 56, and if a suit is brought by A on behalf of himself and others, one of the class cannot appeal—*Watson* vs. *Cave*, 17 Ch. Div., 19. The representative of a party cannot appeal without an order of Court allowing his name to be entered on the register of suits—*Juggoo Lal* vs. *Lalla Bhikun Lal*, 5 W. R., 133; and if he be a purchaser, he must join his vendors—*Dhunnoo Sowdagur* vs. *Sunnoo Bibee*, 15 W. R., 106; *Judooputtee Chatterjee* vs. *Chunder Kant Bhuttacharjee*, 9 W. R., 309; unless the transfer took place early in the case and the vendee got his name substituted without objection on the part of his opponent—*Moneeroodeen Mojoomdar* vs *Parbuty Churn Ghose*, 15 W. R., 121. So it has been held that the purchaser of the right, title and interest of a defendant in a suit has no right as such to appeal from a decree passed against the defendant—*Gujadhar Pershad* vs. *Gunesh Tewaree*, 15 W. R., 485; 7 B. L. R., 149. So also it was held under Act VIII, 1859, that the name of a purchaser of the rights of a plaintiff in a suit could not be substituted for that of the plaintiffs, nor upon the application of a party so substituted could the suit be allowed to be withdrawn; but that such an order, if made, was not open to appeal, but might be brought before the High Court in the exercise of its special powers of superintendence under its charter—*Judooputtee Chatterjee* vs. *Chunder Kant Bhuttacharjee*, 9 W. R., 309.

The power to appeal is limited by the relations between the different parties. Thus, a defendant, whether interested or *pro formâ* only, cannot appeal against a co-defendant—*Gudadhur Banerjee* vs. *Mussamut Mun Mohinee Dossea*, 7 W. R., 366; (but if he does, and the decree is against him, he is estopped—*Kasee Chunder Roy* vs. *Sreemutty Doorga*, 11 W. R., 410); and if a decree is passed partly in favour of, and partly against, plaintiff, and one defendant appeals against the decree in favour of plaintiff making the co-defendant a respondent, the latter need not appear, and plaintiff cannot be allowed at the hearing to raise objection to the portion of the suit dismissed against him and in favour of the other defendant—*Goonomonee Dossia* vs. *Parbutty Dossia*, 10 W. R., 326. A person who was wrongly made a party under Act VIII, section 73, appealed against the decree. The suit was remanded for trial after expunging his name. The defendant was held not debarred from appealing against the decree, after remand, although he had left the first appeal to the intervenor—*Bucha Singh* vs. *Mirza Mashook Ali*, 15 W. R., 572. Where, however, a decree was obtained against A and others, and A not appealing the decree was set aside and the case remanded on the appeal of the co-defendants, but re-affirmed by the first Court. *Held*, A could not appeal from the last decree—*Nund Kishore Singh* vs. *Balmokund*, 1 Shome, 12.

Stamp.—An Appellate Court has no power to receive an instrument on payment of the proper stamp and penalty unless they were tendered in the lower Court—*Champabutty* vs. *Bibi Jibun*, I. L. R., 4 Cal., 213. A cannot appeal so as to effect B's rights under the decree unless he makes B a respondent—In the matter of *Ram Mohun Dey*, 20 W. R., 149.

Agreement not to appeal.—If appellant agrees not to appeal no appeal will lie—*Munshi Amir Ali* vs. *Maharani Inderjeet Singh*, 14 Moore, 203; *Protab Chunder* vs. *Arratoon*, 10 C. L. R., 443; and if he carries on the appeal contrary to the contract a suit for damages will lie—*Jati Ram* vs. *Dass Ram*, 3 C. L. R., 574. See also *Rogober Dyal* vs. *East India Company*, Fulton, 146.

High Court, Calcutta.—A petitioner in regular appeal should not be called upon by the department registrar to deposit the costs of translating, &c., any papers of which he has not furnished a list with a view to their inclusion in the paper book. The party or his pleader must determine the papers necessary for his case, and the Deputy Registrar must prepare his estimate and demand payment accordingly—*Lalla Bhoop Narain* vs. *Mussamut Nawab Abassee Begum*, 23 W. R., 458.

Limitation.—An appeal to the Court of the district Judge must be filed within thirty days from the date of the decree appealed against—Art. 152, schedule II, Act XV, 1877, but it may be admitted after the prescribed period when the appellant satisfies the Court that he had sufficient cause for not presenting it within the period—section 5, Act XV, 1877; *Flowest* vs. *Syud Kootub Hossein*, 1 Agra, F. B., 100; but if the Court does not think the cause sufficient, the order of refusal is final—In the matter of *Bhujohuree Mundul*, 18 W. R., 293; *Rajcoomar Roy* vs. *Shaikh Mahomed Walis*, 7 W. R., 337; if on the other hand it admits the appeal, the decision can be contested in an appeal from the decree—*Mouree Bewa* vs. *Soorundarnath Roy*, 10 W. R., 178; *Surbhai Devalji* vs. *Raghunathji Vasanji*, 10 Bom., 397. Miscalculation of the period is not a sufficient cause—*Zaibulnissa Bibi* vs. *Kulsam Bibi*, I. L. R., Alla, 251; and where an appellant withdrew his appeal and thus prevented a cross appeal by the respondent, it was held that this did not constitute a sufficient reason for admitting the latter to appeal after time—*Surbhai Devalji* vs. *Raghanathji Vasanji*, 10 Bom., 397. So also where a person merely pleaded illness his application was rejected—*Masoom Ali Khan* vs. *Panchoo Bibi*, 9 W. R., Mis., 29; but the illness of a mokhtar—*Anund Moyee Dossee* vs. *Poornoo Chunder Roy*, 9 Moore, 26; or the fact that there is a review pending—*Koller Singh* vs. *Jewan Singh*, 22 W. R., 79; see B. L. R., F. B. R., 349, 728; or that the applicant has been unable to obtain a copy of the judgment—section 541; *Jagarnath Singh* vs. *Sheewratan Singh*, 15 B. L. R., 272, is sufficient. For previous practice, see *Horil Pattuck* vs. *Bhowanee Ram*, 21 W. R., 308.

Form of appeal.

541. The appeal shall be made in the form of a memorandum in writing presented by the appellant, and shall be accompanied by a copy of the decree appealed against and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

What to accompany memorandum.

Contents of memorandum.

Such memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed against, without any argument or narrative; and such grounds shall be numbered consecutively.

Where the judgment in the case governs other cases the filing of that judgment is a substantial compliance with the section—*Muthoora Nath Chuckerbutty* vs. *Kissen Mohun Ghose*, W. R., Mis., 1864 p. 9; *Bhyrub Nath Sandyal* vs. *Huro Soonduree*, W. R., 1864, Mis. 28.

The memorandum of appeal should be presented to the Judge, and not the *Moonsrim*; placing it on the table when the Judge is not present, is not a presentation to him—*Taj Uldeen Khan* vs. *Mussamut Ghufoorulnissa*, 3 Alla., 341.

If presented by a pleader, the grounds must have been drawn up by a pleader who shall certify that he has examined the record, and that the grounds set forth are good. Examining copies of the record is sufficient—*Noor Ahmed*, 17 W. R., 338. If presented by a party or his recognised agent, no pleader will be allowed to appear in support of it unless he certifies that the grounds of appeal set forth are good—Cal. Civ. Cir. O. No. 17, 1879.

The memorandum must bear a stamp according to the law in force for the time being—5 Mad., xliv. The stamp value may be made up by several stamps, though the petition is written on one sheet—*Tarinee Churn Nyabachusputty* vs. *Taranath Gooho*, 12 W. R., 449. If excess stamps have been filed the excess should be returned—In the matter of *Mr. G. H. Grant*, 14 W. R., 47; and if the stamps are inadequate the Court should give the appellant an opportunity of making up the deficiency before rejecting the appeal—*Nusserat Ali Chowdhry* vs. *Mahomed Kanoo Sikdar*, 11 W. R., 541; unless the valuation affects jurisdiction—*Subah Roy* vs. *Buldeo Singh*, 24 W. R., 225; and where an appeal is tried relief cannot be limited to the portion covered by the stamps—*Balo Ram Sircar* vs. *Ram Narain Banerjee*, 10 W. R., 242.

Where appellant described the respondents as "A and others" it was held that the names of the other respondents could not be added after the expiry of the period of limitation—*Himmatoonnessa*, appellant, S. D., *Sum, Decis.* April 24, 1851.

Appellant filed an appeal against the judgment of the first Court without a copy of the decree, subsequently he filed the decree within the time allowed to appeal, and the Judge accepted it. It was held that the irregularity was cured, and the appeal should have been heard—*Lallee* vs. *Ram Pershad*, 2 Agra, 35.

Under the rules of practice adopted by the Allahabad High Court copies of judgments are not required in appeals under clause 10 of the Letters Patent and no deduction will be made from the period fixed for appealing on account of the time necessary to obtain copies of them—*Fazul Mahomed* vs. *Phul Kuar*, I. L. R., 2 Alla., 192.

A petitioner for review of an order passed under section 409, and must file a memorandum of objections in the form presented for a memorandum of appeal—*Adarji Edulji* vs. *Manikji*, I. L. R., 4 Bom., 414.

Appellant confined to grounds set out.

542. The appellant shall not, without the leave of the Court, urge or be heard in support of any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of contesting the case on that ground.

This section applies to H. C.

It is a condition precedent to an advocate or vakil being heard that some duly certified ground or grounds of appeal should have been filed. When appellant filed the grounds of appeal himself, and did not appear in person, but through a vakil, who declined to certify to the grounds of appeal, the appeal was dismissed—*Kishen Chunder Roy* vs. *Hurish Chunder Bose*, 3 W. R., 216. But if any ground has been properly filed, the Court is not confined to it, and may take into its consideration any thing in the case which either affects the regularity of the proceedings of the Court below, or relates to the correctness of the decision upon the merits—*Shamachurn Chuckerbutty* vs. *Bindabun Chunder Roy*, B. L. R., F. B. R., 900; if the decree appears on the face of it illegal it may, as a rule, be impugned at the time of argument—*Poran Sookh Chunder* vs. *Parbutty Doss*, I. L. R., 3 Cal., 612; *Lachman Prasad* vs. *Bahadur Singh*, I. L. R., 2 Alla., 884. provided the respondent has had a sufficient opportunity of meeting the case on that ground, and the Court does not go beyond the subject-matter of the appeal laid before it. A sued B for possession of property belonging to C and got a decree for one-half C's property *minus* X. A appealed as regards X only, and it was held that the Judge had no power to award her the whole of C's property instead of the one-half—*Sharoda Soondures Debee* vs. *Gobind Monee*, 24 W. R., 179.

In a suit for rent one of the defendants appealed on part but, with the leave of the Court, argued against the whole decree, on the ground that a co-proprietor had not been made a defendant, and the suit was dismissed. The High Court set aside the judgment on the ground that the Judge could not entertain such an objection upon the appeal only of one of the defendants as to a small portion of the decree—*Nakur Chunder Saha* vs. *Jadoo Nath Chuckerbutty*, 24 W. R., 389.

Notes of Counsel.—Notes of counsel may be referred to in appeal—*Earl De La Warr* vs. *Miles*, 19 Ch. Div., 80.

Rejection or amendment of memorandum.

543. If the memorandum of appeal be not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

When the Court rejects under this section any memorandum, it shall record the reasons for such rejection.

When a memorandum of appeal is amended under this section, the Judge, or such officer as he appoints in this behalf, shall attest the amendment by his signature.

This section applies to H. C.

Memorandum of appeal.—In drawing up grounds of appeal it should be remembered that no subsequent event or devolution of interest can affect the decision of a question as it stood at the time the decision was pronounced. To give effect to these, some supplementary proceedings and not an appeal is necessary—*Anund Moyee Chowdhrain* vs. *Shib Chunder Roy*, 2 W. R., P. C., 19. A party cannot appeal on account of an irregularity committed at his instance or with his consent—*Maharajah Koowur Baboo Mustrasur Singh* vs. *Baboo Nundlall Singh*, 8 Moore, 199; and the grounds must be such as arise from the pleadings and evidence, and are necessary for the decision of the case—*Nawab Sidhee Nuzur Ali Khan* vs. *Rajah Ojoodhyaram Khan*, 10 Moore, 553. Thus in a suit by a Hindu widow for possession and declaration of title, a defendant cannot urge for the first time in appeal that by a family custom females could not inherit—*Tekait Doorga Koonwaree* vs. *Mussamut Doorga Koonwaree*, 13 W. R., 10.

A petition of appeal stating that the proceedings of the lower Court are irregular and contrary to law is too general and vague—*Goree Monee Dossee* vs. *Juggut Indra Narain Chowdhry*, 11 Moore, 1.

When a memorandum is returned a time should be fixed by the Court, for its return—*Sheo Partub* vs. *Sheo Gulam*, I. L. R., 2 Alla., 875.

If the memorandum is taken up with argument and narrative, it should be rejected, leaving the appellant to bring a new appeal on a fresh stamp—*Bussunt Singh* vs. *Lalan Singh*, W. R., 1864 p. 386; but it should not be rejected as insufficiently stamped without requiring the appellant to supply the additional stamp—*Anund Mohun* vs. *Doorga Dass*, W. R., Mis., 1864, p. 3.

Appeal.—No appeal is given from an order rejecting an appeal under this section—section 588, *post*.

One of several plaintiffs or defendants may obtain reversal of whole decree if it proceed on ground common to all.

544. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal against the whole decree, and thereupon the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants, as the case may be.

This section applies to H. C.

The general rule is that a judgment should be reversed as to the appellant without affecting the judgment as to those parties who do not appeal, when a several judgment could have been properly made in the first Court—*Koolada Pershad Misree* vs. *Gouree Chand Misree*, 17 W. R., 353. Thus, where A sued B and C for possession, the one as patnidar, the other as mukarraridar, and the first Court gave a decree against B the patnidar only, the second Court was considered wrong in giving a decree against C on the appeal of B—*Greesh Chunder Singh* vs. *Gour Mohun Banerjee*, 7 W. R., 49; *Womesh Chunder Bose* vs. *Matunginee Debia*, 2 W. R., 170. This section declares that where the appellant appeals against the whole decree—*Ram Chunder Paul* vs. *Omora Churn Deb*, 18 W. R., 26; *Chunder Monee Dossee* vs. *Modhoo Dey*, 21 W. R., and the decree of the lower Court, whether *ex-parte* or not—*Sreenath Chowdhry* vs. *Grey*, 13 W. R., 114, has proceeded upon some ground common to all, and in such cases only—*Protab Chunder Dutt* vs. *Koorbannissa Bibee*, 14 W. R., 130; *Ram Mohinee Debia* vs. *Jabed Sircar*, 6 W. R., Act X 82, the Appellate Court may reverse the whole decree on the appeal of only one of the parties—*Sreemutty Khermukeree Dossee* vs. *Nilumbar Mundul*, 2 W. R., 227; and it has been held that it only applies to decrees affecting in the same manner the whole of the plaintiffs or defendants, that is to say, a decree incapble of division, and upon which it would be impossible for a Court to find in one sense for some of the plaintiffs or defendants, and in the opposite sense for the other plaintiffs or defendants; for instance, where the suit relates to property in which all the plaintiffs or all the defendants are co-sharers or joint owners—*Sreeram Ghuttuck* vs. *Brojo Mohun Ghossal*, 11 W. R., 449. Thus where A and B were sued on a *joint* contract, and a decree was passed against both, though A never appeared; it was held that the Appellate Court was competent to dismiss the suit on the appeal of B, on the ground that there was no joint liability, but that B occupied a separate estate at a separate rent—*Lukhy Kant Sein* vs. *Ramdoyal Dass*, Marsh., 281.

Cases within the section.—A sued B and C for rent. They admitted holding the land, but denied the rate. The suit was decreed in the lower Court, but was set aside on the appeal of B—*Sreesteedhur Chuckerbutty* vs. *Sreenath Biswas*, 18 W. R., 332; and so where the suit was on a mortgage bond (joint) which was held collusive,

the cause was dismissed on the appeal of one of the defendants—*Ram Lochun Soor* vs. *Nitya Kalee Debia*, 12 W. R., 211; *Sufur Ali Soudagar* vs. *Buseeroolla Soudagar*, 6 W. R., 323. A sued B, C and D for rent on a contract of partnership. The claim was decreed, but set aside at the appeal of B for want of jurisdiction—*Sree Minjuree Dossee* vs. *Poorusuttum Doss*, 9 W. R., 499. A sued B and a minor C for debts due by them as partners, and the claim was decreed to be realized out of the property of the father of B, C only appealed. *Held*, an ordinary decree for account of partnership property binding all the parties could be passed—*Joy Kisto Cowar* vs. *Nittayand Nundy*, 1. L. R., 3 Cal., 738. In a suit for rent B intervened, asserting that he was entitled to the rents and was made a co-defendant; the suit was decreed. The intervenor alone appealed against the whole decree, and it was set aside as against both —*Doyal Chunder Sahoy* vs. *Nobin Chunder Adhicarry*, 16 W. R., 235; *Kanhye Roy* vs. *Shaikh Hyder Buksh*, 25 W. R., 29; and where parties who had been made co-defendants as co-sharers did not appear, and the case was decided against them under section 116, Act VIII, the case was set aside on the appeal of the first defendant—*Doorga Churn Sett* vs. *Shamanund Gossain*, 12 W. R., 376. Two parties claiming different interests in a certain share sued separately to set aside a sale of the share. Both suits were dismissed; one suit was appealed, and on appeal the sale was set aside as to the whole of the share and not merely as to the interest of the party appealing—*Shaik Nagar* vs. *Shunatoollah*, 20 W. R., 77. A, as purchaser of D's rights, sued B and C for possession, asserting that they were mere benameedars for D, holding under a colourable purchase. There was no allegation they held in shares. On the appeal of B the decision of the first Court in favour of A was set aside—*Katyanee Chowdhrain* vs. *Madhub Narain Roy Chowdhry*, 4 W. R., 68. And where A sued B, C and D for possession of land on the strength of a mortgage bond executed by B and C, who denied execution, and D claimed under them by purchase, the case was dismissed against them all on the apppeal of D, on the ground that the bond was false—*Srimati Jadumani Dasi* vs. *Srimati Fudu Bibee*, 7 B. L. R., App., 28. Where the first Court dismissed the suit as barred by limitation this section was held to apply—*Mohunt Rung Lall Gossain* vs. *Gouree Mundul*, 10 W. R., 286. And generally if the main ground of the whole decision affects all the defendants in common, this section will apply. A sued B on a mortgage bond; C who claimed the property under mortgage executed by B was admitted as a defendant at his own application, but was afterwards excluded from the suit and ordered to pay his own costs. On the appeal of B only, A's mortgage bond was set aside, and he was directed to pay C's costs—*Yerrabalu Viraragava Reddi* vs. *Abdul Khadir Sahib*, 4 Mad., 26 Where A claiming land as mukararidar sued B and C who both denied A's title, and C held as lessee from B, and the first Court decided that A had a good title against B and C, the decision was set aside on the appeal of B—*Shaikh Mahomed Saefoollah* vs. *Shaikh Anwar Ali*, 21 W. R., 112. And in a suit under section 9, Act VI, (B. C.) 1862, to measure the lands of several ryots who all denied the plaintiff's title, where the suit was decreed on the ground that plaintiff's vendor was proprietor, and had received the rents up to the date of sale, the decree was set aside in favour of all on the appeal of some—*Doorga Churn Dass* vs. *Mahomed Abbas Bhooyan*, 14 W. R., 121. This is an extreme case; see also *Chunder Kula Dossee* vs. *Jotendro Mohun Tagore*, 6 W. R., 104.

Where a widow granted a putni of lands in which she had only a life estate and the reversioners sued for immediate possession on the ground of waste, it was held that the putnidar was entitled to appeal on the whole case, and on his appeal the suit was dismissed—*Lall Soonder Dass* vs. *Hurry Kishen Doss*, Marsh., 113.

Cases not within the section.—A as purchaser from B, sued B and C, members of a Hindu family, for certain lands. B and C denied the sale, and C added that he was no party to the deed, and as the property was joint, B had no power to sell. The first Court held that the purchase deed was genuine, that the property was self-acquired and decreed the suit. C alone appealed against the whole decree, and the first Appellate Court, finding that the property was joint and the deed had not been executed by B, dismissed the suit against both. In appeal this was set aside as far as the execution of the deed by B was concerned. Bayley, J., said :—"I would say on the first point that under section 337 of Act VIII of 1859, I think the lower Court could decide as it has done on the appeal of the co-sharers because the 'ground' of title 'common to both,' was that which was found by the lower Appellate Court to exist, *viz.*, the *co-parcenery of the appellants in the property sold*, and the non-execution and invalidity of the deed of sale by which the property of the appellant *co-sharers was purported to be conveyed to plaintiff*, and which deed was plaintiff's sole ground of title." Phear, J., held an opposite opinion. He said :—"Again, it appears to me that section 337 applies only to those cases where the Court below has made a decree against several persons, whether plaintiff or defendant, upon a finding of law or fact which applies to all persons alike. In such a case the section enables the Court of appeal, on the application of any one or more of the persons decreed against to affirm, modify, or reverse the whole decree, as well with regard to its force against those who did not appeal, as against those who did. The case before us was a suit to obtain possession of land which the plaintiff alleged was conveyed to her by the first defendant Bonomalee. Bonomalee denied that he ever executed such a conveyance. The other defendants joined in the plea, and further, alleging that the land in dispute was the joint property of themselves and Bonomalee, pleaded that as they were not parties to the conveyance, it could not be operative against

them. The Sudder Ameen decreed in favour of the plaintiff adversely no doubt to all the defendants alike; but as against the two sets of defendants respectively, the decree was based on widely different grounds. As against Bonomalee, it was based on the ground that he had executed the conveyance. This of itself would not have supported a decree against the other defendant, although no doubt (as was ably urged before us) an opposite finding on this point would certainly have decided the suit in their favour It is not enough, however, that the suit might have been determined by a decision of the Court upon some one issue common to all the parties decided against; still less that if was capable of being so reversed or actually was so reversed in the Appellate Court. The question is—was it so determined in the Court below. And in this case it must be in the negative. The finding, which was the sole ground of decision against Bonomalee, did not touch the main defence of his co-defendants; as against them something quite independent of it was necessary, and accordingly the Sudder Ameen, before he could decree against them, was obliged to find that he had no interest in the land." Trevor J., said:—"In the present case the judgment of the lower Court was passed against Bonomalee on the ground of the execution by him of a deed of sale, and against the others on the ground that they opposed the plaintiff's enjoyment of his purchase wrongfully. The ground on which the decision was given was not common to all, and therefore section 337 does not apply"—*Sreemutty Kherumkuree Dossee* vs. *Nilambur Mundal*, 2 W. R., 227.

In the case of *Boydonath Surmah* vs. *Ojan Bibee*, 11 W. R., 238, A sued five persons, not co-sharers, for possession, asserting a distinct title and ouster by the defendants jointly. Defendants pleaded limitation, and denied the plaintiff's title. The first Court decreed the suit, and on the appeal of one defendant the first Appellate Court found that plaintiff had no title, that the suit was barred, and dismissed it against all; but the High Court set the decree aside Hobhouse, J., said:—"There is no doubt that on the question of limitation and on the question of the existence of the dakhilee tenure the Court of first instance delivered a judgment which proceeded on grounds common to each of the defendants; but on the real merits of the case, that is on the question of title, the grounds which had hitherto been in one sense common to all the defendants became at once distinct for each of these defendants."

It is obvious from these decisions that the learned Judges considered the common ground must be the sole ground; and impliedly held that if the Court of first instance finds against a plaintiff on any common ground, and then unnecessarily goes on to discuss the case against each individual defendant, this section does not apply.

Of staying and executing Decrees under Appeal.

Execution of decree not stayed solely by reason of appeal.

545. Execution of a decree shall not be stayed by reason only of an appeal having been preferred against the decree; but the Appellate Court may for sufficient cause order the execution to be stayed:

Stay of execution of appealable decree before time for appealing has expired.

If an application be made for stay of execution of an appealable decree before the expiry of the time allowed for appealing therefrom, the Court which passed the decree may for sufficient cause order the execution to be stayed:

Provided that no order shall be made under this section unless the Court making it is satisfied—

(*a*) that substantial loss may result to the party applying for stay of execution unless the order is made;

(*b*) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

This section applies to H. C.

When an action is dismissed no order can be made under this section except in regard to costs—*Otto* vs. *Tendford*, 18 Ch. Div., 394; but the Court of appeal can in a proper case grant an injunction to restrain parties from parting with the property till the hearing of the appeal—*Wilson* vs. *Church*, 11 Ch. Div., 576.

This section applies to decrees for moveable and immoveable property—In the matter of *Ranee Ismaid Kooer*, 9 W. R., 448; which are not pending appeal to the Privy Council—*Muttealaummal* vs. *Chellaymmal*, 5 Mad., 98.

An order of a Civil Court directing criminal proceedings to be taken against parties or witnesses, is not decree, should not be incorporated in the decree disposing of the suit, and cannot be stayed in execution—*Ram Churn*, S. D., N. W., 1863, p. 367.

Before making an application under this section a pleader should verify that the statements made to him were made by the proper parties—In the case of *Sreenath Roy*, Pleader, 17 W. R., 405.

The winning party is not bound to execute his decree pending appeal—*Shaikh Mahomed Busseeroollah Chowdhry* vs. *Ram Kant Chowdhry*, 16 W. R., 266; nor is he prohibited from so doing on the ground that the period for appealing has not expired—*The Deputy Collector of Sonthal Pergunnahs* vs. *Binode Ram Sein*, 5 W. R., Mis., 53; though if he does, he will be compelled to make restitution if the decree is set aside. But the Appellate Court after an appeal has been filed, or the Court of first instance if the application is made before the period of appeal has expired and an appeal lies, but no other Court—*Barlow* vs. *Abdool Haye*, 17 W. R., 341; may in its discretion—*Wise* vs. *Rajkrishna Roy*, B. L. R., F. B. R., 550, stay execution if sufficient cause is shown—In the matter of *Ranee Ismaid Kooer*, 9 W. R., 488; by a party and a party only—*Khiluck Chunder Ghose* vs. *Prosunomonee Dassee*, Marsh., 478; but only on condition that the applicant has given security—*Sagore Chunder Chuckerbutty* vs. *Shreboneme*, Bourke, 103; has not been guilty of great delay—In the matter of *Leslie*, Petitioner, 17 W. R. 160; and will suffer great injury unless the application is granted—*Nawab Sidhee Nazar Ali Khan* vs. *Oloodhyaram Khan*, 1 Ind. Jur., N. S., 185; *Wilson* vs. *Church*, 12 Ch. Div., 454. The statement of defendant that he has brought another suit for the purpose of getting his right to possession declared, is not a sufficient reason for staying execution in a decree for ejectment—*Mahomed Hossein Khan* vs. *Lootfali Khan*, 20 W. R., 393; nor is it sufficient that the day fixed for sale in execution is near the latest safe day for the payment of revenue, and the petitioner might thereby suffer material injury—In the matter of *Ahmed Reza*, Petitioner, 13 W R, 281.

When proceedings are ordered to be stayed on giving security, the judgment-debtor must be allowed a reasonable opportunity to shew that the security offered is sufficient—*Mussamut Bahooria Dodhma Kooer* vs. *Lal Jumahir Lal Panrey*, 20 W. R., 52. Where a defendant gave a security bond under this section to account for mesne profits, and excution was stayed, he was held to be estopped from subsequently asserting that execution could not issue for the mesne profits, or that plaintiff should seek his remedy in regular suit—*Sadasiva Pillai* vs. *Ramalinga Pillai*, L. R., 2 Ind. App., 219.

If the decree is reversed in appeal, the security bond should be returned. In a suit in which security was given the decree was reversed on appeal by a Division Bench; it was held that the liability of the surety ceased, although an appeal had been preferred to a Full Bench—In the matter of *Moonshee Amir Ali Khan Bahadoor*, 13 W. R., 403, *Shivlal* vs. *Apaji*, I. L. R., 2 Bom., 654; see however *Jivi* vs. *Ramji*, I. L. R., 3 Bom., 207.

If the decree is upheld, then the creditor may realise the amount due even after more than three years from the date of any proceedings taken in execution—*Sheo Golam Sahoo* vs. *Rahut Hossein*, I. L. R., 4 Cal., 6.

A temporary stay of the warrant of execution does not prejudice the decree-holder's right to execution at a subsequent time—*Butchenner* vs. *Rayudu*, 5 Mad., 285.

A Civil Court cannot stay execution in cases in which an appeal has been made to the Privy Council against a decree of the High Court—*Muttealaummal* vs. *Chellayammal*, 5 Mad., 98; nor release a surety from security taken from him by the High Court to enable a decree-holder to execute his decree—*Abedoonnissa Khatoon* vs. *Ameeroonnissa Khatoon*, 17 W. R., 464.

The Court making an order under this section can cancel or modify it at any time—In the matter of *Moonshee Amir Ali Khan Bahadoor*, 13 W. R., 403.

The plaintiff obtained a decree which was set aside on appeal, and the Judge ordered execution of his own decree to be stayed pending a special appeal. *Held*, that this was an improper order, and it was set aside in the exercise of the extraordinary jurisdiction of the High Court which remarked:—The defendant was entitled, as soon as the decree against him ceased to exist, to have his property released from attachment, and to be restored to his original position. The plaintiff, having lost his decree, is in no better position, until his appeal is decided, than a plaintiff before judgment. He would not be entitled to have the defendant's property attached before judgment, unless he were able to satisfy the Court that the defendant is about to dispose of, or remove, his property, in order to obstruct or delay execution of any decree that might be passed against

him; and even then he would not be entitled to such relief unless the defendant should fail to furnish security. But the effect of the Judge's order is to give to the plaintiff an attachment before judgment without any proof having been offered that the defendant has a dishonest intention, and without any option having been offered to the defendant of furnishing security, and retaining possession of his own property"—*Kavasji Brimji* vs. *Dhondiraj*, 10 Bom., 411.

Security in case of order for execution of decree appealed against.

546. If an order is made for the execution of a decree against which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shewn by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Appellate Court.

or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

And when an order has been passed for the sale of immoveable property in execution of a decree for money, and an appeal is pending against such decree, the sale shall on the application of the judgment-debtor be stayed until the appeal is disposed of, on such terms as to giving security or otherwise as the Court which passed the decree thinks fit.

This section applies to H. C.

Appeal is pending.—No action can be taken under this section unless an appeal is pending—Petition of *Bhugwan Chunder Ghose*, 6 W. R., Mis., 15; In the matter of *Burra Lall*, 16 W. R., 289. Where A sued B and the suit was finally decreed by the High Court, and B sued A, but his suit was dismissed, B could not compel A to give security in execution pending the decision of B's dismissed case to the Privy Council—*Luchmeeput* vs. *Mir Mahomed Lukee Chowdhry*, 3 W. R., Mis, 20. See the case of *Otto* vs. *Tenford*, 18 Ch. Div., 394, and of *Wilson* vs. *Church*, 11 Ch. Div., 576, referred to under section 545, *ante*.

If the application is made before execution has been taken out the applicant must start his case by shewing there is some probability that, if the decree-holder receives the property, he will be unable to recover it or its value back from him—*Sukhee Monee Debia* vs. *Brojoraj Mookerjee*, 17 W. R., 69. If the decree has been executed before the appeal has been filed, the only ground (if any) on which security can be demanded is for the due performance of the decree or order of the Appellate Court—*Mussamut Jairut-ool Butool* vs. *Hosseiner Begum*, 10 Moore, 796; *Mansukhram Parshotam* vs. *Javarevohu*, 7 Bom., 122; and for this special cause must be shewn such as that the property was being wasted or improperly dealt with—*Juggo Lall Oopadhya* vs. *Jankee Behee*, 17 W. R., 521.

Security taken under this section is not confined in its operation to the first Appellate Court; it includes whatever order may be passed on appeal, whether on the first appeal, or by the High Court on special appeal—*Narayan Dev* vs. *Gajanan Dikshit*, 10 Bom., 1.

In section 36, Act XXIII, 1861, the words were "it shall be lawful for the Court which pronounced the decree," &c., thus leaving it within the discretion of the first Court to act or not—*Wise* vs. *Rajkrishna Roy*, B. L. R., F. B. R., 550; now no such discretion is allowed to it, but only to the Appellate Court. It would seem as if the latter Court cannot act under the last paragraph.

This section does not apply to cases in appeal from the High Court to the Privy Council, but when the lower Court is informed that there has been an appeal to the Privy Council from the decree it should exercise a discretion and allow time to the parties to apply to the High Court to stay execution or to require security from the party in possession, before issuing execution, unless there should be some danger that the property would be made away with in the interval—*Wise* vs. *Rajkrishna Roy*, B. L. R., F. B. R., 541.

Restitution.—When a decree is reversed the lower Court is bound to restore the defendants to the property out of which they had been turned in execution, whether the appellate decree expressly directed it or not—In the matter of *Raj Kissen Singh*, B. L. R., F. B. R., 607; 6 W. R., Mis., 111; *Lati Kooer* vs. *Sahodra Kooer*, 2 C. L. R., 75; and where a Judge refused to realise an amount paid in execution, and directed the defendant to bring a regular suit, the High Court com-

pelled him under the Charter Act to enforce restitution, and execute that part of the appellate decree giving costs—In the matter of *Gobind Koomar Chowdhry*, B. L. R., F. B. R., 714. A refund carries interest—*Wooma Soonduree Burmonia* vs. *Gooroo Pershad Roy*, 15 W. R., 74; but not interest on costs—*Rodger* vs. *The Comptoir d'Escompti de Paris*, L. R., 3 P. C., 665; unless the propriety of paying such interest has been submitted to the Court—*Forester* vs. *Secretary of State for India*, L. R., 4 Ind. App., 137.

No such security to be required from Government or public officers.

547. No such security as is mentioned in sections 545 and 546, shall be required from the Secretary of State for India in Council, or (when Government has undertaken the defence of the suit) from any public officer sued in respect of an act alleged to be done by him in his official capacity.

This section applies to H. C.

Of Procedure in Appeal from Decrees.

Registry of memorandum of appeal.

548. When a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Register of Appeals.

Such book shall be called the Register of Appeals.

This section applies to H. C.

Ordinarily the time for rejecting on appeal would be when the appeal is presented and not after it has been admitted—*Gopee Bullub Roy* vs. *Goluck Proshad Bose*, W. R., 1864, p. 135; but though an appeal has been admitted it must be rejected on the ground that it was not preferred within the prescribed period—Illus. 6, Act XV, 1877, section 4, opposing *Bharut Chunder Roy* vs. *Issur Chunder Sircar*, 8 W. R., 141; unless it has been admitted on sufficient cause being shown, and if it were shown that the appellant had obtained leave for the admission on any misrepresentation, or suppression of fact, or if the respondent could show that there was no sufficient cause of any sort or kind, or if he showed that the Appellate Court had made any mistake in admitting the appeal, though the appellant had not been guilty of fraud, probably the Court would feel itself at liberty to set aside its own order and remove the case from the file—*The Secretary of State for India in Council* vs. *Mutu Sawmy*, 4 B. L. R., Ap., 85; 13 W. R., 245; *Syed Jafer Hossein* vs. *Shaikh Mahomed Ameer*, 4 B. L. R., Ap., 106. In any case the order is open to revision in special appeal—*Mowri Bewa* vs. *Surendra Nath Roy*, 2 B. L. R., 184. See note on section 543, *ante*.

An appellant has no power to withdraw an appeal which has been regularly registered, without the permission of the Court—*Kareem Bee* vs. *Begam Bee*, 3 Mad., 368.

Appellate Court may require appellant to give security for costs.

549. The Appellate Court may at its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

When appellant resides out of British India.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India independent of the property (if any) to which the appeal relates.

If such security be not furnished within such time as the Court orders, the Court shall reject the appeal.

This section applies to H. C.

This section does not apply to appeals from orders of a Judge sitting as a Commissioner of the Insolvent Court—In the matter of *Ramsebak Misser*, 5 B. L. R., 179. A relator can be compelled to give security—*Cazee Mozhur Hossein* vs. *Dino Bundoo Sein*, Bourke, 40. The Court can act only on an application of the respondent, but once the application has been filed, the Court (and for this purpose a single Judge of the High Court is empowered—*Monohur Doss* vs. *Khodrum Begum*, Brouke, 110) may demand security under the first paragraph, and is bound to do so under the second, at any time before the hearing of the appeal; setting aside—In the matter of *Jogendro Deb Roy Kut*, 18 W. R., 102; for the costs in either or both Courts, and overruling.—In the petition of the *Calcutta and South-Eastern Railway Company*, 8 W. R., 217. At the same time a respondent should be careful to object if security has not been given when appearing to oppose the appeal, or else it might be urged that he had waived his right—*Wise* vs. *Jugbundoo Bose*, 7 Moore, 431. No separate application to dismiss the suit is necessary—*Mahammadbhai Dharamsi* vs. *Bhanji Topan*, 3 Bom., 64.

The usual practice is for the respondent to obtain a rule *nisi* on affidavits as to the fact; on the day fixed for hearing the appellant shows cause and the respondent then replies—*Bamasundari Dassee* vs. *Ramnarayan Mitter*, 7 B. L. R., Ap., 59. No appeal lies from an order under the first paragraph—*Gopal Khundee Rao* vs. *Deokee Bundun*, 6 Alla., 173.

If the appellant has appealed in *forma pauperis* this section will not apply—*Nusseeruddin Biswas* vs. *Ujjal Biswas*, 17 W. R., 68. See however *Seshayyangar* vs. *Jainalavadin*, I. L. R., 3 Mad., 66; *Harlock* vs. *Ashberry*, 19 Ch. Div., 84; *Ivory*, 10 Ch. Div., 372; but where the appellant though admittedly a pauper, is a mere tool in the hands of others who are able to give security—*Jogendro Deb Roykut* vs. *Funnindro Deb Roykut*, 18 W. R., 102; *Seshayyangar* vs. *Jainalavadin*, I. L. R., 3 Mad., 66; (but see the case *Maneckji Sunji* vs. *Goolbai*, I. L. R., 3 Bom., 241); or the merits of the case appear to be in favour of the respondent—*Muzhur Hossein* vs. *Denobundo Sein*, Bourke, 119; *Waddell* vs. *Blockey*, 10 Ch. Div., 416; or the appellant is the assignee of an insolvent debtor—*Heeralall Seal* vs. *Carapiet*, 13 W. R., 431; or the parties have so agreed—*Elias* vs. *Chuckerbutty*, 1 Ind. Jur., *N. S.*, 223; security should be demanded. But where the respondent is admittedly the heir he should not be required to give security—*Bhugobutty Churn Bhuttacharjee* vs. *Issur Chunder Chatterjee*, 16 W. R., 311.

A party allowed two months to furnish security, tendered by petition a darputnee on the last day, and on the next day put in an unregistered security bond. The Judge rejected the bond, but his order was set aside, and he was directed to enquire into the sufficiency of the security on the ground that it was not necessary to register the bond until the security had been accepted—*Dunne* vs. *Ameeroonnissa Khatoon*, 13 W. R., 41.

A sued B, and was compelled to deposit security for costs as he resided out of British territory. He got a decree; B appealed. It was held that B could not ask that the deposit should be retained in Court to meet the costs of the appeal—*Fleming* vs. *Sheurman*; 4 B. L. R., 93.

A bond given as security for costs may be enforced in a summary way by process of execution—*Chutterdharee Lal* vs. *Rambelashee*, I. L. R., 3 Cal., 398; *Bans Bahadur Singh* vs. *Mugla Begum*, I. L. R., 2 Alla., 604.

A was ordered to give security and, failing, respondents' solicitor without writing to appellant's solicitors gave notice of motion to dismiss the appeal for want of prosecution. The motion came on for hearing the day after the security was given. *Held*, the appeal would not be heard until A paid the costs of the motion—In re *Baum*, 90 Ch. Div. 9.

Appellate Court to give notice to Court whose decree appealed against.

550. When the memorandum of appeal is registered, the Appellate Court shall send notice of the appeal to the Court against whose decree the appeal is made.

Transmission of papers to Appellate Court.

If the appeal be from a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Copies of exhibits in Court whose decree is appealed against.

Either party may apply in writing to the Court against whose decree the appeal is made, specifying any of such papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of the applicant, and shall be deposited accordingly

This section applies to H. C.

If there is any part of the record not sent up which the appellant wishes to bring before the Appellate Court, it is his duty to ask the Court to send for it before the day of trial—*Buksh Ali Sowdagar* vs. *Joyanut Khan*, 11 W. R., 248.

Power to confirm decision of lower Court without sending it notice.

551. The Appellate Court may, if it thinks fit, after fixing a time for hearing the appellant or his pleader, and hearing him accordingly if he appears at such time, confirm the decision of the Court against whose decree the appeal is made, without sending notice of the appeal to such Court and without serving notice on the respondent or his pleader; but in such case the confirmation shall be notified to the same Court.

This section applies to H. C.

This is a new provision, somewhat similar to the procedure followed in disposing of criminal appeals. See section 280, Act X, 1872.

A proceeding under this section is to all intents and purposes a trial—*Thakur* vs. *The widows*, I. L. R., 2 Alla., 819; and a judgment and decree should be drawn up in the usual manner—*Royal Reddi* vs. *Linga*, I. L. R., 3 Mad., 1.

An Appellate Court cannot reverse the decision of the first Court without having the evidence before it—*Nawrung Rai* vs. *Beebul*, S. D., N. W., 1861, p. 219.

Day for hearing appeal.

552. The Appellate Court, unless where it confirms, under section 551, the decision of the lower Court, shall fix a day for hearing the appeal.

Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

This section applies to H. C.

Publication and service of notice of day for hearing appeal.

553. Notice of the day so fixed shall be stuck up in the Appellate court-house, and a like notice shall be sent by the Appellate Court to the Court against whose decree the appeal is made, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided in chapter VI for the service on a defendant of summons to appear and answer; and all rules applicable to such summons and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Appellate Court may itself cause notice to be served.

Instead of sending the notice to the Court against whose decree the appeal is made, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the rules above referred to.

This section applies to H. C.

The appellant is not bound to pay tullubana for the issue of the notice on the respondent under this section : service on the respondent's pleader to conduct the case is sufficient—*Ram Pershad* vs. *Hunooman*, S. D., N. W., 1861, p 140 ; *Ishur Dutt Mundul* vs. *Shib Pershad Thakoor*, 15 W. R., 290.

When a respondent resides at Chandernagore outside British territory, notice of appeal should be forwarded to him by post under a registered cover ; and if he does not appear, a verified statement should be put in to show that he is at present or has recently been residing there—*Sonatun Bukshee* vs. *Gopaul Chunder Shamunto*, 15 W. R., 31 ; a person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents—*Lootf Ali Meah* vs. *Pearee Mohun Roy*, 16 W. R., 223.

If a respondent cannot be served properly, the notice should be returned to the Court and the appellant should apply for an order for substituted service—*Gopaul Doss* vs. *Greedharee Doss*, 6 W. R., 13 ; *Bedhoo Koolanee* vs. *Bonomalee Gurain*, 11 W. R., 496.

When a notice of appeal is transmitted to the lower Court for service with instructions to make a return within a specified time, the appellant is entitled to the whole time allowed and may deposit his tullubana and ask for service any time within the period allowed—*Rungo Debee Boystobee* vs. *Huree Narain Oopadhya*, 11 W. R., 138.

North West.—On receipt of the orders calling for any case passed by the High Court the Judges should at once submit the record before the return of notice to the respondent, or report their inability to do so—2 Civ. Cir. O. (N. W.) 1867 ; and attached to it should be forwarded a report signed by the record-keeper and attested by the Judge, certifying that the papers were found to correspond with the list—1 Civ. Cir. O., N. W., 1873.

Contents of notice.

554. The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex-parte*.

This section applies to H. C.

Procedure on Hearing.

Right to begin.

555. On the day so fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal. The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

This section is new. It applies to H. C.

The irregularity of deciding an appeal before the day fixed will not be interfered within special appeal if the pleaders were present and argued the case—*Mussamut Hukeemunnissa* vs. *Mussamut Bibee Muckdoonum*, 1 W. R., 246.

If it appears that the rules of Court relating to appeals have not been complied with, and no adequate excuse is offered, the appeal should be dismissed—*Bhimji Girdher* vs. *Morgan*, 3 Bom., 63.

Dismissal of appeal for appellant's default.

556. If on the day so fixed, or any other day to which the hearing may be adjourned, the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default.

Hearing appeal *ex-parte.*

If the appellant attends and the respondent does not attend, the appeal shall be heard *ex-parte* in his absence.

This section applies to H. C.

In the absence of the appellant the case must be dismissed—*Munickram* vs. *Roopnarain Singh*, Marsh., 5; provided the case is tried on the day to which the hearing may have been adjourned or on a day of which the appellant had notice—*Shib Chunder Goopto* vs. *Allad Monee Dassia*, 5 W. R., Mis., 22. Thus where two appeals were tried together, and the plaintiff was called upon to attend in one of these cases, and fails to attend, judgment cannot be given against him in the other case—*Arunachella Mudaly* vs. *Vencatachella Mudaly*, 5 Mad., 269. And this should appear in the order—*Huro Chunder Doss Chowdhry* vs. *Ram Coomar Chowdhry*, 2 W. R., 254. And if a Judge, instead of dismissing the suit for default, goes into the merits of the case and gives judgment against the appellant, the appeal must be considered as dismissed for default, and an application for re-admission and re-hearing cannot be treated as one for review, but must be entertained under section 558, *post*—*Mohesh Chunder Bose* vs. *Thakoor Dass Gossamee*, 20 W. R., 425.

If a pleader who has signed the memorandum of appeal refuses to argue the case on the grounds that he is unable and unprepared—*Buldeo Misser* vs. *Syud Ahmed Hossein*, 15 W. R., 143; or if the appellant files the appeal in person and subsequently appears by pleader who refuses to certify the memorandum of appeal—*Kishen Chunder Roy* vs. *Hurish Chunder Bose*, 3 W. R., 216; the case should be dismissed for default.

When a decree is passed, partly in favour of and partly against a plaintiff, and one of the defendants alone appeals making the co-defendant respondent, the latter need not appear or interest himself in the result—*Goonomonee Dossia* vs. *Parbutty Dossia*, 10 W. R., 326.

Where a Court after eleven months' delay and without fixing any day for the disposal of the appeal dismissed it for default, the High Court set aside the order as erroneous, on the ground that the law only applied to cases of voluntary failure to comply with the Court's order—*Soodhamonee Dossee* vs. *Gooroopersad Dutt*, W. R., 1864, p. 176. So where a case was appointed to be heard before the Durga Poojah holidays, but was not, and after the holidays it was decided without appointing a day for hearing the case was remanded for rehearing—*Jeebun Monee Dossee* vs. *Tarinee Churn Ghose*, 3 W. R., Act X., 164.

An appeal lies from a decree passed under this section, in all the provinces except the North-West—*Lal Singh* vs. *Kunjan*, I. L. R., 4 Alla., 387, see note under section 558, *post*.

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit cost.

557. If on the day so fixed, or any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed by the Court, the sum required to defray the cost of issuing the notice, the Court may order that the appeal be dismissed:

Proviso.

Provided that no such order shall be passed, although the notice has not been served upon the respondent, if on the day fixed for hearing the appeal the respondent appears in person or by a pleader, or by a duly authorized agent.

This section applies to H. C.

Within the period fixed by the Court.—Act XXIII, 1861, section 2, contained similar words, and it was held that, unless a time was fixed within which the tullubana should be paid into Court, that the suit could not be dismissed on the ground of failure to deposit—*Purshadee Lall* vs. *Umbica Pershad Lall*, 11 W. R., 290.

May order that the appeal be dismissed.—No appeal is given against such an order—section 588, *post*; as to previous practice, see cases at 10 W. R., 160; 7 W. R., 338; 6 W. R., Mis., 150; 3 W. R., Mis., 23.

Remanded cases—In a remanded case the appellant took no steps to carry on the litigation, and while the Judge was writing his decision, his pleader appeared and said he had no instructions: *Held*, that the case was properly dismissed for default—*Triloke Chun*

der Sein vs. *Aukhil Chunder Sein*, 21 W. R., 65. A suit dismissed for the non-appearance of the parties after it had been remanded on appeal, can be re-instituted if not barred by limitation, as there is no reason why section 96 should not apply to cases remanded as well as to original cases—*Rughoonath Singh* vs. *Ram Coomar Mundle*, 14 W. R., 81; 5 B. L. R., Ap., 64.

Re-admission of appeal dismissed for default.

558. If an appeal be dismissed under section 556 or section 557, the Appellant may apply to the Appellate Court for the re-admission of the appeal; and if it be proved that he was prevented by any sufficient cause from attending when the appeal was called on for hearing or from depositing the sum so required, the Court may re-admit the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.

This section applies to H. C.

The application must be made to the Court dismissing the appeal, and a District Judge has no power to admit a case disposed of by a Subordinate Judge—*Kisto Persad Dutt* vs. *Cowie*, W. R., 1864, p. 315.

To bring a case under this section, the appeal must have been dismissed without a hearing—*Shaikh Mahomed Jan* vs. *Mussamut Ameerun*, 17 W. R., 180; but see *Triloke Chunder Sein* vs. *Aukhil Chunder Sein*, 21 W. R., 65; it does not apply to cases decided *ex-parte* and which the respondent wishes to have re-heard. In these the remedy is under section 560, or by special appeal—*Tarachand Ghose* vs. *Anund Chunder Chowdhry*, 10 W. R., 450.

Qarere.—If an application under this section the same as a review—*Hirdhamundha* vs. *Tinghoor*, I. L .R., 5 Cal., 711.

Any sufficient cause:—Such as being unaware that the case had been transferred from the file of one Judge to that of another—*Narain Singh* vs. *Bheurab Churn Panda*, 8 C. L. R., 350.

An appeal having been struck off, the Judge refused an application under this section, because the appellants had not conformed to a rule of Court that two pleaders should be engaged in every appeal. *Held*, that the Judge was bound to see if the reasons set forth in the application were reasonable or not—*Shomaed Ali Sowdagur* vs. *Eusoof Khan Chowdhry*, 15 W R., 80. If the application is rejected, the reasons for rejecting should be stated in the order—*Huro Chunder Dass Chowdhry* vs. *Ram Coomar Chowdhry*, 2 W. R., 254.

The deposit of tullubana in a wrong Court is no ground for the revival of an appeal dismissed for default, on the ground that the appellant had not deposited tullubana and respondent had not been served—*Mohesh Chunder Bose* vs. *Bhugoban Chunder Mookerjee*, 3 W. R., Mis., 29.

Limitation—One month from the date of the dismissal—Art. 168, schedule II, Act XV, 1877. On the Bombay side it was held under Act VIII, that the period did not begin to run until after the appellant had an opportunity to come in under Regulation II, 1827, section 54, cl. 2—*Alikhan Umarkhan*, 4 Bom., 92.

Appeal—An appeal lies from an order refusing to re-admit an appeal—section 588, *post*; but apparently not from an order of re-admission. The latter can be only challenged on appeal from the appellate decree.

No appeal lay under Act VIII of 1859, from an order dismissing a suit for default, provided the provisions of section 347 had been followed—*Shaikh Mahomed Jan* vs. *Mussamut Ameerun*, 17 W. R., 180; but see *Triloke Chunder Sein* vs. *Aukhil Chunder Sein*, 21 W. R., 65; *Chin Appa Chettye* vs. *Nadaraja Bellai*, 6 Mad., 1; *Devappa Setti* vs. *Ramanadah Bhatti*, 3 Mad., 109; but an appeal did lie from a decision passed *ex-parte*—*Paran Chunder Ghose* vs. *Chukkun Lall Roy*, 21 W. R., 402; *Tara Chand Ghose* vs. *Anund Chunder Chowdhry*, 10 W. R., 450, and does still except in the North-West—*Lal Singh* vs. *Kunjan*, I L. R., 4 Alla., 387.

Power to adjourn hearing and direct persons appearing interested to be made respondents.

559. If it appear to the Court at the hearing that any person who was a party to the suit in the Court against whose decree the appeal is made, but who has not been made a party to the appeal, is interested in the result

of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court, and direct that such person be made a respondent.

This section applies to H. C.

Respondent.—This section does not allow a person to be made an appellant even if he consents.

Re-hearing on application of respondent against whom *ex-parte* decree made.

560. When an appeal is heard *ex-parte* in the absence of the respondent, and judgment is given against him, he may apply to the Appellate Court to re-hear the appeal; and if he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.

This section applies to H. C.

A defendant who did not appear in the first Appellate Court, although his interests were identical with those of the plaintiffs, cannot appeal specially against the judgment passed in favour of his co-defendants—*Jugunath Chatterjee* vs. *Gordon Stuart & Co.*, 6 W. R., 36.

The Court is bound to enquire into the truth of an application made under this section; and it must be accompanied by evidence in support of the allegation on which the petition is founded—*Miselbach*, Petitioner, 6 W. R., Mis., 43; *Mahomed Kalan* vs. *Denomoyee Daskya*, 8 C. L. R., 112; *Anunda Shaha Biswas* vs. *Rema Bibee*, I. L. R., 6 Cal., 548.

Appeal.—An appeal will lie from an order refusing to re-hear an appeal under this section—section 588, *post*.

Upon hearing respondent may object to decree as if he had preferred separate appeal.

561. Any respondent, though he may not have appealed against any part of the decree, may upon the hearing not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has filed a notice of such objection not less than seven days before the date fixed for the hearing of the appeal.

Form of notice, and provisions applicable thereto.

Such objection shall be in the form of a memorandum, and the provisions of section 541, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

This section applies to H. C.

Object of Cross Appeal.—A party may be satisfied with the decree of the lower Court and may be willing to allow it to stand unimpeached if his opponent does not think it necessary to appeal, but he may not be willing to have the decree modified or altered upon appeal, in favour of his opponents without having the whole decree set right. Suppose a defendant sets up two defences to a claim brought against him, and the lower Court determines in his favour as to one of them, and against him as to the other, the plaintiff's claim would be dismissed. The lower Court might be wrong as to both defences, and ought to have decided in the defendant's favour the defence which was decided against him, and *vice versa* If the plaintiff were to appeal and to reverse the decision of the lower Court, upon the defence decreed in the defendant's favour, it would be unjust not to allow the defendant, if he could, to show that the lower Court was wrong

in point of law in determining the other defence against him, for he might thereby be able to show that the lower Court was substantially right in dismissing the plaintiff's suit, though wrong as to the defence which barred it—*Ishore Ghose* vs. *James Hill*, W. R., Sp. No. 49; Marsh., 153; in other words "he may support the decree on any of the grounds decided against him in the lower Court." On the other hand, the respondent may take any objection to the decree of the lower Court which he might have taken if he had preferred a separate appeal—In the matter of *Mirza Himmut Bahadur*, B. L. R., F. B. R., 431, and show that the points decided against him should have been decided in his favour—*Hills* vs. *Ishore Ghose*, Marsh., 151; and if he does not do so the appellant should not be put in a worse position by his own appeal, and the most unfavorable order that should be passed is to dismiss the appeal—*Baboo Ramsahoo* vs. *Sheikh Cham*, S. D., N. W., 1861, p. 547; *Hem Chunder* vs. *Syed Ahmed Reza*, Marsh., 332. This principle does not cover any questions decided between the co-respondents, and only extends to the contention between the respondent and the appellant who has forced him into Court—*Baboo Shote Lall* vs. *Kishun Singh*, S. D., N. W., 1863, p. 361; unless the decree has proceeded on a common ground of the nature referred to in section 544 [but see *Anund Chunder Goopta* vs. *Mohesh Chunder Mozoomdur*, 1 W. R., 229, and the remarks on it at 24 W. R., 181]. So where A sued B for possession of land and made C a co-defendant, alleging collusion with B, and the Court decree the suit against B, but dismissed it against C, holding that she had been long in possession as ryot and there was no collusion; it was held on an appeal by B that the plaintiff A should not be allowed to take a cross-appeal as regards the dismissal of his case against C—*Anwar Jan Bibee* vs *Azmut Ali*, 15 W. R., 26. And when A sued B and C, and the suit was dismissed as regards C, it was held that A could not raise the question of dismissal by a cross-appeal on the appeal of B—*Anunto Dass Sein* vs. *Ramjoy Sein*, 1 W. R., 435; *Greesh Chunder Singh* vs. *Gour Mohun Banerjee*, 7 W. R., 49; and see *Hossein Buksh Patooah* vs. *Shaikh Baroo Beparee*, 5 W. R., 50. Both parties appealed from the decision of the first Court and the appeals were dismissed. Plaintiff then appealed to the High Court: *Held*, defendant could not by way of cross objection, impugn the decision of the lower Court dismissing his appeal—*Ganga Prasad* vs. *Gajadhar*, I. L. R., 2 Alla., 651.

A defendent or respondent cannot be heard by way of cross-appeal against a co-defendent or co-respondent—*Maharajah Tarucknath Roy* vs. *Thubooroonnisa Chowdhrain*, 7 W. R., 39; *Goonomonee Dossia* vs. *Probutty Dossia*, 10 W. R., 326. In a later case A, B and C sued D and others for possession, of 3 kanees of land. The suit was dismissed as to one-half against A and B, decreed as to one-half in favor of B and C under a different title; A and B, appealed as regards the portion disallowed, and it was held that D could not raise any question as regards the portion decreed to B and C jointly, as C was not before the Court—*Mooizunnissa* vs. *Mooraree Dhur Dey*, 22 W. R., 314. This certainly appears to unduly limit the section. In any case if it were considered necessary to have the absent party present, the Court should have given the respondent an opportunity to procure his attendance under section 559—*Mahomed Ameer* vs. *Pran Kishore Deb*, 21 W. R., 338. So in a suit against several persons for damages the single defendant who lost appealed, and in appeal the plaintiff objected that the damages were insufficient, and that the other defendant should have been made jointly liable: *Held*, the Court was justified in bringing the other parties before it, in increasing the damages, and assessing them jointly on the original appellant and one of the acquitted defendants—*Anund Chunder Goopto* vs. *Mohesh Chunder Mozoomdar*, 1 W. R., 229; but see the case at 9 W. R., 273.

Where the defendant does not appeal against nor file objections to the amount awarded to the plaintiff by the Court of first instance, the Appellate Court has no power to reduce it—*Nyanchandra* vs. *Narayan*, I. L. R., 4 Bom., 293.

A cross objection which has not been filed 7 days before the date fixed for hearing, and cannot be heard, will not be treated as a substantial appeal—*Digamber Mozumdar* vs. *Kallynath Roy*, I. L. R., 7 Cal., 654.

Objections not allowed.—A respondent cannot insist on his objections being heard when the appeal is dismissed for default—*Baroda Kant Bhuttacharjee* vs. *Peary Mohun Mookerjee*, 23 W. R., 57; or if the appellant withdraws from the appeal before the hearing has begun—*Bahadoor Singh* vs. *Bhugwan Dass*, 2 Agra F. B., 23; *Coomar Puresh Narain* vs. *Watson & Co.*, 23 W. R., 229; *Shamachurn Ghose* vs. *Radhakisto Chaklanavis*, 14 W. R., 210; although if it has been called on, he will get his costs—*Ram Pershad Ojha* vs. *Bhurosa Koonwar*, 9 W. R., 328; and the fact that the appellant has by withdrawing his appeal deprived the respondent of the right to have his objection heard is no ground for admitting the latter to appeal after issue—*Surbhai Dayalji*, 10 Bom., 397; but if once the hearing has commenced the respondent can insist on having his objection heard and determined—*Venkataramanaiya* vs. *Kuppi*, 3 Mad., 302; *Coomar Poresh Narain* vs. *Watson*, 23 W. R., 229, if it is brought forward before the respondent has closed his case—*Thakoor Dass Goshamee* vs. *Gopeekristo Goshamee*, 15 W. R., 18.

In Bengal this section applies to special appeals—*Hill* vs. *Ishore Ghose*, Marsh., 153; section 587, *post*; In the matter of *Mirza Himmut Bahadoor*, B. L. R., F. B. R., 429. Not so in Madras—*Makudee Ravullan* vs. *Mastan Sahib*, 1 Mad., 102.

Stamp.—A cross-appeal raising an objection must be in the form of a memorandum of appeal, should bear the proper stamp, and cannot be heard until the stamp shall have been paid—*Saroda Soonduree Debee* vs. *Gobind Monee*, 24 W. R., 179. See, however, the case at 15 W. R., 511.

Notice must now be given, seven days before the date fixed for hearing under section 552—*Deo Kishen* vs. *Maheshar Sahat*, I. L. R., 4 Alla., 248. See, as to the old practice—*Gobind Jugdeb* vs. *Denobundho*, 9 C. L. R., 281; in the matter of *Madhobee Dossee*, B. L. R., F. B. R., 587.

Remand of case by Appellate Court.

562. If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register and proceed to investigate the suit on the merits.

The Appellate Court may, if it thinks fit, direct what issue or issues shall be tried in any case so remanded.

This section applies to H. C.

Where a case has been decided on a preliminary point, and essential evidence has thereby been excluded, and the decree is reversed in appeal, then the Appellate Court has the discretionary power to remand the case—*Muniappah Naido* vs. *Iysamy Mudelay*, 5 Mad., 313; but subject to the general rule that under no circumstances can a case be remanded on account of any error, defect or irregularity in the decision or procedure, unless the error, defect or irregularity affects the merits of the case, or the jurisdiction of the Court—section 578; *Gunga Monee Dosee* vs. *Issur Chunder Saha*, 17 W. R., 465; and this whether the appeal is direct or only a cross-appeal—*Chundernauth Surma* vs. *Romanauth Surma*, 1 W. R., 69.

Remand not allowed.—No remand should be allowed if the decision of the first Court has been upheld in great part—*Madhub Chunder Dey* vs. *Ram Dyal Guho*, 8 W. R., 303; since it implies a reversal of the first judgment—*Kebul Kishen Mozoomdar* vs. *Mussamut Ambala*, 7 W. R., 326. And where the lower Court has not decided the case on a preliminary point, *i.e.*, before the case is gone into—*Syed Hussein Ali* vs. *Manoowar Ali*, 21 W. R., 413; but has gone into evidence—*Goluck Chunder Sein* vs. *Puresh Mahomed*, 25 W. R., 284; or has decided the case on a preliminary point, but not excluded material evidence—*Herrikosema* vs. *Stephenson*, 1 W. R., 298; *Joog Maya Debia* vs *Ram Chunder Chatterjee*, 10 W. R., 378; *Lalla Shoobh Narain* vs. *Nursing Narain*, 20 W. R., 148, the Appellate Court must keep the case on its own file, and decide it, proceeding under section 566, if necessary—*Bama Churn Dutt* vs. *Puddo Mookhee Goopto*, 25 W. R., 389; *Hill* vs. *Osman Biswas*, 25 W. R., 35, and cannot grant a remand, although the lower Court may have confined its decision to limitation—*Mussamut Rama Kooer* vs. *Lalla Bhugwan Lall*, 22 W. R., 224; *Syed Hussein Ali Chowdhry* vs. *Manoowar Ali*, 21 W. R., 413; or to one or two issues without finding on the rest—*Obhoy Churn Deo* vs. *Ram Doollub Deo*, 25 W. R., 131; *Ramjoy Sein* vs. *Nundo Moyee Debia*, 10 W. R., 374; *Shaikh Abdool Wahed* vs. *Omdah Bebee*, id., 469; and this procedure has been approved of by the Privy Council—*Tarakant Banerjee* vs. *Puddomoney Dossee*, 5 W. R., P. C., 63. A remand should not be granted even to take additional evidence—*Mohesh Chunder Dass* vs. *Madhub Chunder Sirdar*, 13 W. R., 585; nor to re-settle issues, the issues being wrong—*Shaikh Futtehoollah* vs. *Oomdanissa Bebee*, 14 W. R., 69; nor to amend the plaint—*Forzand Ali* vs. *Yusuf Ali*, I. L. R., 2 Alla., 669. Nor can a case be remanded because the evidence has been imperfectly recorded—*Mohesh Chunder Doss* vs. *Madhub Chunder Sirdar*, 13 W. R., 85; nor for defect of parties—*Wise* vs. *Ishan Chunder Banerjee*, 14 W. R., 380; nor because several distinct cases have been tried together—*Snadden* vs. *Todd, Finlay & Co.*, 7 W. R., 313; nor for erroneous valuation; but if the valuation affected jurisdiction, the suit should be dismissed—*Augopura Chowdhry* vs. *Meah Bebee*, 10 W. R., 207. Much less should a case be remanded when the applicant asserts that he has proved his case—

Gopal Chunder Gooho vs. *Juggodumba Dossia*, 10 W. R., 411 ; *Mahomed Ashan* vs. *Mahomed Yasin*, 9 W. R., 106 ; or there has been a local investigation—*Jeebun Kissen Roy* vs. *Dwarkanath Roy*, W. R., 1864, p. 63. In some cases the law has not been followed, and remands have been allowed on the ground of surprise—*Shib Pershad Pattack* vs. *Nobo Kishen Mookerjee*, 17 W. R., 446 ; or that the Court mistook the nature of the case—*Juggur Nath Panee* vs. *Rajah Chutter Narain Deb*, 17 W. R., 410 ; or to try an issue not properly tried—*Ram Chand Mookerjee* vs. *Kameenee Dabea*, 10 W. R., 236 ; but see *Umbika Churn Mundle* vs. *Ramdhun Mohurrir*, 11 W. R., 35.

An improper order of remand is not void, only irregular—*Mirza Jowad Ali* vs. *Hossein Bibee*, 8 W. R., 207 ; against it an appeal will lie, section 588, *post* ; *Loki Mahto* vs. *Aghoree*, I. L. R., 5 Cal., 144. At first it was considered that a party who submitted to the remand could not contest it afterwards—*Golam Munteja Chowdhry* vs. *Goluck Chunder Roy*, 3 W. R., 191 ; but this idea has been abandoned, and it is settled that a party may impeach the remand on appeal from final decree—*Mussamut Mizajoolnissa* vs. *Bunshee Dhur*, 1 Alla., 277 ; *Mussamut Wazeerun Bebee* vs. *Shaikh Warris Ali*, 1 W. R., 51, and then it will be set aside, provided it has prejudiced the merits of the case or the jurisdiction of the Court—*Nowcourie Mundul* vs. *Mookta Bebee*, 2 W. R., 181 ; *Nussurudeen Hossein Chowdhry* vs. *Lall Mahomed Purramanic*, 13 W. R., 234.

Appeal.—An appeal lies from an order of remand, section 588 *post*. In such an appeal the High Court may enter into the merit of the lower Court's decision on the preliminary point, and if it finds the order defective may allow the party who won in the first Court to retain the benefit of his decree—*Loki Mahto* vs. *Aghori Lall*, I. L. R., 5 Cal., 144. See also *Badam* vs. *Imrit*, I. L. R., 3 Alla., 675.

When further evidence barred.

563. When a case is remanded with directions to take any evidence so excluded, the Court to which the case is remanded shall not take any other evidence in the case, except evidence tendered to contradict the evidence so taken.

See 110 W. R., 303. This section applies to H. C.

Practice.—When a case is remanded, the lower Court should fix a reasonable date for the parties to appear and carry on the suit—*Haradhun Chuckerbutty* vs. *Protap Narain Chowdhry*, 14 W. R., 401 ; *Watson & Co.* vs. *Kunhye Bahadoor*, 9 W. R., 294 ; and if they do not appear the case should be dismissed—In re *Kalee Mohun Doss*, 17 W. R., 70. No fresh vakalutnama is necessary—*Nobin Monee Dossee* vs. *Joy Gopal Gossur*, 1 W. R., 276. Costs of the appellate Court can be recovered only when the order of remand provides for them—*Digambur Chatterjee* vs. *Ram Roodro Gungopadhya*, 13 W. R., 39.

When a case is remanded to a District Judge he should not transfer it to another officer—*Chowdhry Hamedoolah* vs. *Mutteeonnissa Bibee*, 15 W. R., 574.

If a party, who is offered a remand, elects to go on with the case as it stands, he is estopped from impugning the decision on that point—*Nobbo Lall Khan* vs. *Maharanee Odheranee Narainee Koomaree*, 3 W. R., 5. Where a case came on before a Court on remand, and the Judge observed that the evidence of witnesses would be unnecessary, the plaintiffs were held justified in not applying to summon any—*Ram Jewn Singh* vs. *Radha Pershad Singh*, 16 W. R., 109.

Effect of order.—When a case is remanded no express order is necessary to take evidence—*Kisto Churn Chuckerbutty* vs. *Muggun Chuckerbutty*, 10 W. R., 491 ; *Ram Sunkur Sein* vs. *Nilkant Biswas*, 9 W. R., 392 ; where the order is general and for a new trial, it opens up the whole case—*Tarinee Kant Lahoory* vs. *Koonj Beharee Awustee*, 12 W. R., 113 ; *Gudhadur Dutt* vs. *Shushee Monee Dossia*, 21 W. R., 7 ; and evidence may be received from defendants who did not appear at the former trial—*Khoonj Beharee Awastee* vs. *Tarinee Kant Lahory*, 8 W. R., 285 ; save so far as the case has been decided by the Appellate Court—*Mussamut Judoobunsee Kooer* vs. *Mussamut Asman Kooer*, 14 W. R., 370. Where a case was remanded for trial on the merits, it was held that the lower Court had jurisdiction to decide on the plea of limitation—*Rajah Tey Kishen Roy* vs. *Shib Chunder Bose*, 3 W. R., Act X, 158 ; though an ordinary remand to try on the merits excludes all questions of limitation and *res judicata*—*Sheo Sahoy Tewaree* vs. *Ram Pershad Narain Tewarree*, 24 W. R., 333 ; *Saheb Tewaree* vs. *Kishoree Sahoy Singh*, id., 330 ; and jurisdiction—*Temulji Rustamji* vs. *Fadunji Kavasji*, 5 Bom., 138 ; and binds the parties to the issues laid down—*Gungaram Dutt* vs. *Chowdhry Junmajoy Mullick*, 1 C. L. R., 141 ; *Saraj Dev* vs. *Chattar*, I. L. R., 3 Alla., 755 ; and unless an application for re-

view be made, an order for remand made on special appeal is a conclusive determination of the point of law involved, and the correctness of law so laid down cannot be questioned, on a second appeal—*Ram Keevarbhai* vs. *Damodhar Narbheram*, 6 Bom., 146.

A party cannot change the nature of his case after remand—*Radha Kishor Bose* vs. *Mahtab Chand Bahadoor*, 3 W. R., Mis.,5 ; *Norendro Coomar Dutt* vs. *French*, 3 W. R., 198.

When a case is remanded by one Judge, and subsequently comes before another of equal jurisdiction—*Brojo Soordur Goossamee*, vs. *Juggut Chunder Day*, 21 W. R., 199, or the Judge's successor—*Luleet Panday* vs. *Byjnath Singh*, 14 W. R., 285, the latter officer cannot set aside the order of remand. So where a Judge remanded a case to be tried on a certain issue and directed the Munsiff to give plaintiff a decree according to the decision at which he would arrive, and the case went back again in appeal before another Judge ; it was held that the Appellate Court was limited to seeing whether the issue was a proper issue or not; but could not go behind the order—*Bodun Burooah* vs. *Abdool Gunny*, 19 W. R., 281. See also *Saraj Dev* vs. *Chuttar*, I. L. R., 3 A la., 755.

An order to examine witnesses about seals impliedly includes a direction to have the seals produced. Reg. Ap. No. 3187.

No fresh evidence would be allowed in a case remanded under section, 148, Act VIII, 1859—*Puddo Lochun* vs. *Sirdar Khan*, 12 W. R., 23.

A case under section 230, Act VIII of 1859, was admitted and partially investigated. *Held*, the Appellate Court could remand it to be registered and dealt with as a regular suit—*Russool Bibee* vs. *Mobaruck Ali*, 11 W. R., 186.

If on the return of the case it appears that the remand order has not been carried out the Court, in remanding of a second time, should point out the manner in which the carrying out of the previous order seeme ddefective—*Radhabullub* vs. *Anundmoyee*, W. R., Mis., 1864 p. 39.

A review was granted for the purpose of seeing whether a chitta should be admitted and the case remanded for re-hearing. *Held*, it was too late to object to the admission of the chitta in a special appeal from the whole decree—*Makhun Kooer* vs. *Tincowree Dutt*, 14 W. R., 22.

Limit to remand.

564. The Appellate Court shall not remand a case for a second decision, except as proved in section 562.

This section applies to H. C.

When evidence on record sfficient, Appellate Court shall determine case finally.

565. When the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court shall, after re-settling the issues, if necessary, finally determine the case, notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

This section applies to H. C.

If the evidence on the record is sufficient, the Court should decide the case ; if insufficient, then the Court should proceed under the next section—*Bandi Subbaya* vs. *Mundala Palli*, I. L. R., 3 Mad., 96.

When Appellate Court may frame issues and refer them for trial to Court whose decree is appealed against.

566. If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such

issue or question, the Appellate Court may frame issues for trial, and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required,

and such Court shall proceed to try such issues, and shall return to the Appellate Court its finding thereon, together with the evidence.

This section applies to H. C.

If the first Court has entered on the merits of the case, has fixed the proper issues and taken sufficient evidence (section 565), or has not fixed the proper issues, but taken sufficient evidence (section 565), the Appellate Court must decide the appeal without further delay. Two other cases still remain. The lower Court may have omitted to try a certain issue essential to the right decision of the case, or it may not have been guilty of any such omission but decided the case on insufficient evidence. The latter case falls within section 568, the former within the present section—*Runpal Sing* vs. *Maharajah Joy Mungul Sing*, 11 W. R., 106; *Tiluck Chunder Dutt* vs. *Brojo Soondur Mitter*, 24 W. R., 121. And under it the Appellate Court may at its discretion frame the issues which are essential and send them to the lower Court for trial, but should not remand and direct the lower Court to frame the issues—*Chundernauth Surma* vs. *Ramunauth Surma*, 1 W. R., 69. This is the course which should be pursued, if the first Court has not formally settled issues and has failed to pass a satisfactory judgment on any important point raised before it—*Greesh Chunder Lahooree* vs. *Mussamut Bhuggobutty Debia*, 13 Moore, 426; *Brojo Soondur Mitter* vs. *Futick Chunder Roy*, 17 W. R., 407; see also *Mussamut Mitna* vs. *Syud Fuzl Rub*, 13 Moore, 573; or if the investigation has been wholly irregular and incomplete—*Shaikh Umer Ali* vs. *Shaikh Ram Zan Ali*, 23 W. R., 347. But it is always dangerous to allow parties to make a new case in the mofussil Appellate Courts—*Hurpershad* vs. *Sheo Dyal*. L. R., 3 In. Ap., 279; and a Court should be cautious in raising an issue unasked—*Sreeman Chunder Dey* vs. *Gopaul Chuckerbutty*, 11 Moore, 48; *Sreenath Biswas* vs. *Luckhee Narain Aich*, 24 W. R., 268; and should never allow a point not appearing in the plaint or pleadings, or raised in any other way in the first Court, to be framed into an issue—*Ram Narain Roy* vs. *Nil Monee Adhikaree*, 23 W. R., 169; *Pran Kishore Deb* vs. *Mahomed Ameer*, 21 W. R., 338; *Mussamut Ustooram* vs. *Baboo Mohun Lall*, 21 W. R., 333; *Brojo Soondur Mitter* vs. *Futick Chunder Roy*, 17 W. R., 407. See also the remarks of Lord Westbury, in *Caton* vs. *Caton*, L. R., 2 H. L., at p. 144.

In a suit for damages for negligence, where the Court may take two or more different views as to the proper measure of damages, the plaintiff must come prepared with evidence as to the proper amount of damages according to the view which the Court adopts; and if he neglects to do so the Appellate Court is not bound to take additional evidence itself or to send the case back for retrial—*Anundo Lall Doss* vs. *Boy Cauntram Roy*, 4 C. L. R., 473.

When a Judge proceeds under this section, he should not reverse the decree of the lower Court and remand the suit—*Boncharee Ghose* vs. *Ainooddeen Biswas*, 24 W. R., 137; [but see *Umbika Churn Mundle* vs. *Ramdhun Mohurer*, 11 W. R., 35,] though if he does no special appeal lies unless it affects the merits of the case or the jurisdiction of the Court—*Gunga Monee Dassee* vs. *Issur Chunder Shaha*, 17 W. R., 465; [but see *Bungo Chunder Banerjee* vs. *Chunder Nath Chukerbutty*, 25 W. R., 107]. But he should frame the necessary issues and send them down for trial—*Naraimharav Krishnarav* vs. *Antaji Virupaksh*, 2 Bom., 61; and keep the suit pending till the return of the first Court's finding on the issues with the record of the trial—*Wise* vs. *Ishan Chunder Banerjee*, 14 W. R., 380.

The effect of such an order is not a re-hearing, and save as to the issues sent down the first Court has no power to deal with the case—*Gossain Dowlut Geer* vs. *Bessessur Geer*, 22 W. R., 207. The successor of a Judge who has fixed an issue and sent it down to be tried cannot go behind the order—*Wise* vs. *Ishan Chunder Banerjee*, 14 W. R., 380; in the matter of *Kali Kristo Tagore*, 24 W. R., 20. The parties should have the fullest opportunity to produce their evidence—*Latoo Mundul* vs. *Bhoobun Mohun*, 17 W. R., 361.

A Court to which a case is remanded for re-trial on a particular issue amongst others, cannot allow that issue to be abandoned and proceed to try the case upon the other issues raised —*Shib Chunder Lahiri* vs. *Joymala Dasi*, 7 C. L. R., 103.

It has been doubted whether the corresponding section of Act VIII of 1859 applied to special appeals—*Kali Kristo Tagore* vs. *Judoo Lall Mullick*, 24 W. R., 20. A doubt has been also expressed as to the power of a single Judge sitting in special

appeal case to refer issues for trial—*Kali Kristo Pal Chowdhry* vs. *Ram Chunder Nag*, 9 C. L. R., 457. See note under section 568.

See in connection with this section—*Shepherd* vs. *Henderson*, 7 App., Cas., 49.

Appeal.—There is no appeal from an order referring issues for trial—*Kali Kristo Chowdhry* vs. *Ram Chunder Nag*, 9 C. L. R., 461.

Finding and evidence to be put on record. Objections to finding.

567. Such finding and evidence shall become part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to the finding.

Determination of appeal.

After the expiration of the period fixed for presenting such memorandum, the Appellate Court shall proceed to determine the appeal.

This section applies to H. C.

The Appellate Court, on the return of the finding and evidence—*Shumbo Chunder Surnokar* vs. *Russick Chunder Chung*, 15 W. R., 346, should fix a reasonable time for the parties to file their objections; one day is not sufficient—*Bukhtouree* vs. *Meheen Lall*, 3 Agra, 96. After the period has expired, the Court may at its discretion receive or decline to receive any written objection, but in any case is bound itself to consider the finding of the lower Court on the merits; it is not precluded from hearing arguments for and against the finding at the hearing of the appeal—*Woomesh Chunder Roy* vs. *Jonardun Hajrah*, 15 W. R., 235; *Munrakhum Lall* vs. *Raheem Buksh*, 4 Alla., 72; *Sheo Gholam* vs. *Ram Jeawan Singh*, 5 Alla., 114; *Akbari Begum* vs. *Welayatali*, I. L. R., 2 Alla., 908; [but see *Ashrufoonnissa Begum* vs. *Stewart*, 9 W. R., 438]; but if no objection is raised by either party within the period allowed, or at the hearing, the Appellate Court should not amend the finding—*Ratan Singh* vs. *Wazir*, I. L. R., 1 Alla., 165; *Akbari Begum* vs. *Wilayat Ali*, I. L. R., 2 Alla., 908; *Kalee Doss Roy* vs. *Khirod Soonduree Debia*, 16 W. R., 300. See also the case of *Chootay Lall* vs. *Chunnoo Lall*, I. L. R., 4 Cal., 744.

Objection.—Where an issue has been directed to be tried in special appeal and the finding and evidence returned, a special appellant cannot take an objection going to the merits such as that the finding is contrary to the evidence. The objection must be such as would form a ground of special appeal—*Nilayatatchi* vs. *Venkalachalam Madali*, 1 Mad., 250.

Production of additional evidence in Appellate Court

568. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if

(*a*) the Court against whose decree the appeal is made refuses to admit evidence which ought to have been admitted, or

(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence to be produced, or document to be received, or witness to be examined.

Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission.

This section applies to H. C.

Additional Evidence.—It is always dangerous to allow parties to make a new case and call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially so in the Mofussil Courts in India—*Hurpurshad* vs. *Sheo Dyal*, L. R., 3 In. Ap., 297; and the power given under this section should be exercised very sparingly by the Courts, except at the instance of the parties; because when it is done not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses the parties themselves would have thought fit to adduce, and it is possible that the new enquiry may be itself imperfect and not sufficiently extensive to answer the purposes of justice—*Sreemanchunder Dey* vs. *Gopalchunder Chuckerbutty*, 11 Moore, 48. Even on the application of parties great caution should be exercised in admitting new evidence. In the case of *R m Persad Sookul* vs. *Rajunder Sahoy*, 6 W. R, 265, Peacock, C. J. said :—"I am of opinion that the case ought not to be remanded for the purpose of enabling the plaintiff to make out a fresh case. Each of the parties had to prove his case in the lower Court, and each of them ought at that time to have given all the evidence in his power in support of his case. If we were to remand cases for the purpose of allowing parties to improve their respective cases by calling further witnesses there would be no end to litigation." Properly speaking, it is only when a Court sees that from some inadvertence, mistake or surprise a party has not adduced evidence which he was capable of adducing, and that he is likely to be prejudiced by the omission, that the Court should allow further evidence to be taken—*Gowhur Ali Khan* vs. *Mussamut Sakheena Khanum*, 15 W. R., 507; *Bigsby* vs. *Dickenson*, 4 Ch. D., 24. See also *Weston's case*, 10 Ch. Div., at p. 582. It can exercise the power even after the case has been remanded on special appeal —*Kali Kristo Tagore* vs. *Judoo Lall Mullick*, 24 W. R., 20. It is not necessary that the party, before Applying to the appellate Court under this section, should have sought for a review of the original Court's judgment, and asked it to receive the evidence—*Ram Lall* vs. *Rung Lall*, 17 W. R., 47.

Documents.—An application to admit fresh documents, the genuineness of which can be tested with certainty, stands on a much more favourable footing than an application to admit fresh parol evidence after the pinch and pressure of the case has been sustained—In re *Wiltshire Iron Company*, L. R., 3 Chan. Ap., 449; but they should not be admitted if the applicant had an opportunity of tendering them in the Court below and omitted to do so—*Ex-parte Isaac*, L. R., 6 Chan. Ap., 58; *Bebee Zahura* vs. *Bhugwan Dass*, 16 W. R., 211; or if it does not bear on the issues tried by the Court of first instance, an affidavit explanatory of appellant's conduct in carrying on the case is inadmissible—*Leslie* vs. *Allender*, 17 W. R., 390.

Where the first Court refused plaintiff's application for a postponement to summon five of his witnesses, but postponed the case for ten days as 15 witnesses were present, new evidence was allowed—*Abelakh Roy* vs. *Guggun Bhuggut*, 22 W. R., 268; and so where plaintiff was not examined on a certain point, and at the close of the defendant's case one of the witnesses gave evidence discrediting him, and it was of such a nature as could not be easily fabricated, the Court of Appeal allowed rebutting evidence, although no application had been made in the lower Court till the close of the speech of the plaintiff's counsel—*Bigsby* vs. *Dickenson*, 4 Ch. D., 24; *Shaikh Komuroodeen* vs. *Shaikh Monye Mundul*, 16 W. R., 280. And where a Munsiff, without framing issues or examining the plaintiff passed a decree in his favour upon an admission made by the defendant and upon the inspection of a document that was upon the record of a former suit, and the Judge in appeal reversed the decision on account of the want of evidence, it was held that the Judge should have proceeded under this section, since the Munsiff, though asked, did not take the plaintiff's evidence—*Appa* vs. *Vithoba*, 6 Bom, 88. See also *Bhoobun Mohun* vs. *Airooddeen*, 1 *Shome*, 147.

A local enquiry may be ordered under this section—*Roy Sultan Bahadoor* vs. *Munt Laloo Kooer*, 17 W. R., 300.

The improper reception of evidence under this section is not sufficient to reverse a decision, if, independently of that evidence, there is sufficient evidence on the record—*Maharajah Jugadindra Banwari Govind Bahadoor* vs. *Bhabatarini Dasi*, 5 B L. R., Ap., 54; 14 W. R., 19.

After a review has been admitted, fresh evidence may be taken under this section—*Beharee Lall Nundee* vs. *Troyluckho Moyee Burmonee*, 12 W. R., 233; *Gunnesh Ram Surmah* vs. *Rohine Dassee*, 14 W. R., 236.

Practice.—When a Court exercises the power allowed it under this section, the reasons for so doing should be invariably recorded or minuted on the proceedings—*Sreemanchunder* vs. *Gopalchunder Chuckerbutty*, 11 Moore, 48; in open Court in the presence of the parties—*Gunput Roy* vs. *Ram Deour Roy*, 21 W. R., 416; but

it is not a condition precedent to the reception of the evidence—*Gunga Gobind Mundal* vs. *The Collector of the 24-Pergunnahs*, 11 Moore., 368; so that the omission would not render the evidence inadmissible—*Bhugwan Chunder Ghose* vs. *Raj Coomar Gooho*, 13 W. R., 303 [doubting the cases of *Lowa Jha* vs. *Bisseshur Singh*, 11 W. R., 6; *Joog Maya Debia* vs. *Ram Chunder Chatterjee*, 10 W. R., 378; as irreconcileable with the Privy Council's decisions above referred to]. See also *Beharee Lall Nundee* vs. *Troyluckho Moyee Barmonee*, 12 W. R., 223.

In England a person desiring to produce further documentary evidence should give notice to the other side that he will apply at the hearing for leave to produce it—*Hastie* vs. *Hastie*, 1 Ch. D., 562; *Hyde* vs. *Wardin*, 3 Ex. D., 74; but if he wishes to examine witnesses he must apply for leave by motion previous to the hearing of the appeal—*Dicks* vs. *Brooks*, 13 Ch. Div., 652; See also *Cahill* vs. *Martin*, L. R. Ir. 7 Ch. Div. at p. 365; *Jones* vs. *Chennell*, 8 Ch. Div. at p. 504.

Appeal.—A special appeal will not lie from an order refusing to admit additional evidence—*Kulpoo Singh* vs. *Thakoor Singh*, 15 W. R., 429; *Golam Mukdoom* vs. *Mussamut Hafeezoonnissa*, 7 W. R., 489; [the remedy is by review—*Ram Lall* vs. *Rung Lall*, 17 W. R., 47; *Mohesh Chunder Sheet* vs. *Soshee Mookhee Debie*, 6 W. R., 196, or from an order admitting it; but both may be reviewed in an appeal from the final decree unless the appellant has taken advantage of the order and so cannot subsequently impugn it in appeal—*Mohunt Damoodur Dass* vs. *Ritoo Sing*, 24 W. R., 325. If it be found that evidence has been improperly admitted the Appellate Court may, apparently, reject it—*Mohesh Chunder* vs. *Madhub Chunder Sirdar*, 13 W. R., 85; see *Juggut Indur Bunwaree* vs. *Bhubo Tarinee Dassee*, 14 W. R., 19.

When evidence is taken by the first Appellate Court, it does not justify the High Court in special appeal referring to the evidence and dealing with the case as a regular appeal—*Adbool Lateef* vs. *Mahomed Kamail*, 22 W. R., 369; 23 W. R., 51.

It has not been finally decided whether this section applies to cases in special appeal—*Kali Kristo Tagore* vs. *Judoo Lall Mullick*, 24 W. R., 20; but see *Waseer Ali* vs. *Kalee Koomar Chuckerbutty*, 2 W. R., 228.

Mode of taking additional evidence.

569. Whenever additional evidence is allowed to be received, the Appellate Court may either take such evidence, or direct the Court against whose decree the appeal is made, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

Act VIII, 1859, section 356. This section applies to H. C.

The lower Court taking evidence under this section acts in a ministerial capacity, and the parties may object to the admissibility of the evidence recorded before it without objection, when it is submitted for the consideration of the Appellate Court—*Ram Joy Surmah* vs. *Rajah Prankishen Singh*, 2 W. R., 80.

If the order is for particular evidence, the lower Court cannot go beyond it. If the order directed the examination of A, the lower Court could not examine A and B—*Bolakee Loll* vs. *Radha Singh*, 1 W. R., 357. But in a case where A was directed to be examined and was ill, his agent was allowed to be examined in his place—*Rajah Syud Reza* vs. *Rajah Enaet Hossein*, 1 W. R., 330. It is difficult to support this decision.

Points to be defined and recorded.

570. In all cases where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

This section applies to H. C.

Form of Order.—"The Principal Sudder Ameen having found the first and second issues in favour of the plaintiff, upon evidence which was not legally admissible against the defendants Burroda and Promoda, and Jankishore and Nobokishore

Lahoree (or other reason), and this Court not being able to pronounce a satisfactory decree upon the merits without further evidence, and being willing to allow the plaintiff to advance further evidence as he may think necessary, it is therefore ordered that the plaintiff be at liberty to adduce such further evidence, provided he give security to the satisfaction of the Principal Sudder Ameen for the restitution of the property taken in execution of the decree of the lower Court, and for the due performance of the decree of this Court. If the plaintiff neglect to give such security within one month from this date, or within such further time as may be allowed on application to this Court, this appeal will be dismissed with costs and interest, and the decree of the lower Court reversed. The evidence to be adduced is to be confined to the following points:—

1st.—Whether, according to the usage of the family, the plaintiff as eldest son is entitled to inherit on the death of his father?

2nd.—Whether, if any usage prevailed in the family, it was waived or abandoned on the death of the father.

3rd.—Whether there is anything contained in any grant or other document relating to the estate, either before or after the accession of the British Government, such as a restriction against alienation or division of the estate which would prevent the plaintiff from being bound by the acts or laches of the father.

If further evidence be adduced by the plaintiff, the defendants are to be at liberty to adduce such further evidence as they may consider necessary. The evidence is to be taken by the Principal Sudder Ameen, and returned to this Court. All exhibits intended to be used by either party are to be filed within six weeks from the date of the arrival of this Court of the Principal Sudder Ameen, or within such further time as the Principal Sudder Ameen may allow for that purpose. As soon as the exhibits shall have been filed, an early day is to be fixed by the Principal Sudder Ameen, for taking and recording the evidence. The record in this case to be returned to the Principal Sudder Ameen, and to be sent back to this Court with the evidence. Upon the return of the evidence either party will be at liberty to apply to the Chief Justice to fix a day for hearing the case"—*Ramjoy Surmah Mozoomdar* vs. *Rajah Puran Kishen Singh*, W. R., Sp. No., 125.

Of the Judgment in Appeal.

Judgment when and where pronounced.

571. The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court against whose decree the appeal is made, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders.

This section applies to H. C.

When a case is called up for hearing in Regular Appeal, the Court should allow the parties or their pleaders to submit the evidence on the record and to comment on it—*Lalla Juggessur Sahoy* vs. *Gapal Lall*, 15 W. R., 54. The senior pleader present has entire control of the appeal—*Sreeneebash Roy* vs. *Umbica Churn Roy*, 12 W. R., 375. Appellants will ordinarily be restricted to their written grounds of appeal—*Mackintosh* vs. *Watson*, 3 W. R., Act X, 123; and where a written ground is not referred to, when the appeal comes on, the Court need not notice it—*Yusoof Ali Chowdhry* vs. *Mussumut Fyzonissa Khatoon Chowdhrain*, 15 W. R., 296.

Duty of an Appellate Court.—As a rule, an objection which, if taken in the first Court, might have been cured should not be listened to in appeal—*Dhurm Dass* vs. *Shama Sundri Debiah*, 3 Moore, at p. 242; see however the case of *Abdulla* vs. *Subbarayyar*, I. L. R., 2 Mad., 346. And an Appellate Court cannot raise an issue in appeal not raised in the Court of first instance—*Brojo Soondur Mitter* vs. *Futick Chunder Roy*, 17 W. R., 407; *Kashinath Roy Chowdhry* vs. *Roy Dwarkanath Chuckerbutty*, 7 W. R., 61; or have the case argued on grounds not presented to the Court below—*Caton* vs. *Caton*, L. R., 2 H. L. at p. 144; *Kachubhai* vs. *Krishnabhai*, I. L. R., 2 Bom., 635; see however *Keenan* vs. *Murphy*, L. R. Ir. 8, Q. B. Div., 285; but when such an issue is raised care should be taken that the parties should have the fullest opportunity of producing evidence on it—*Latoo Mundul* vs. *Bhoobun Mohun Chatterjee*,

17 W. R., 361. This rule should be strictly observed, where the parties have litigated on a certain state of facts—*Inukhee Dossee* vs. *Mahomed Afzul*, 2 W. R., 2; but does not hold when the points raised are as to jurisdiction—*Ram Ruttun Bhuggut* vs. *Bukaoolah*, 1 W. R., 259; *Aukhil Chunder Sen* vs. *Mohinee Mohun*, 4 C. L. R., 491; *Madhub Ali Khan* vs. *Hossein Reza Khan*, 4 C. L. R., 53; or limitation—*Okhetoonissa* vs. *Koochil Sirdar*, 2 W. R., 45; or *res judicata*—*Koylasnauth Chund* vs. *Monmoheeny Dassee*, Marsh., 276; *Mahammad Ismail* vs. *Chattar Singh*, I. L. R., 4 Alla., 69; but see *Vagthena* vs. *Sami Pandither*, I. L. R., 3 Mad., 116; or go to bar the suit—*Sarasvati* vs. *Pachanna Setti*, 3 Mad., 258. But where an issue, which should have formed the subject of a regular suit, was contested on the merits in an interlocutory proceeding, the Court of Appeal would not allow any objection to the form of the litigation to be taken in Regular Appeal—*Gilbert* vs. *Endean*, 9 Ch. Div., at p. 266.

The parties to the suit are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions; though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect—The *Glannibanta*, 1 P. D., 287; *Tayammaul* vs. *Sashachalla Naiker*, 10 Moore, 436. In the case of *Bigsby* vs. *Dickenson*, 4 Ch. D., 29, this proposition was re-affirmed. James, L. J., said:—"With respect to the great weight due to the decision of a Judge of the first instance, whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements, I repeat, and adhere to, what we said in the case of the *Glannibanta* (1 P. D., p. 287). Of course, if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened. But, then, that would be in truth doing away with the right of appeal in all cases of nuisance, for there is never one brought into Court in which there is not contradictory evidence, and there have been, I am satisfied, a larger percentage of appeals in these cases than in any other." So it has been held that the Judge of the Appellate Court should state his own views of the case and should not confine himself to approving of those of the Court of first instance—*Rohimoni Dabi* vs. *Zamiruddin*, 8 C. L. R., 597. There are decisions which are difficult to reconcile with this doctrine; such as that an Appellate Court commits an error in law in disbelieving witnesses believed by the first Court, unless there are *good reasons* for so doing—*Nobin Chunder Pooshalee* vs. *Bungo Chunder Chatterjee*, 25 W. R., 363; *Mussamut Hoymobutty Dossee* vs. *Sreekishen Nundee*, 14 W. R., 58; *Anund Chunder Chuckerbutty* vs *Rutnessur Doss Sen*, 25 W. R., 50; or that it is not justified in believing a witness whose demeanour has been declared not satisfactory—*Gopee Nath Mookerjee* vs. *Boddhumunt Mal*, 25 W. R., 26. Although the Appellate Court should form its own opinion, it should bear in mind that the advantage which the Judges of the first Court have of forming a correct opinion on the credibility of the witnesses, affords a strong presumption in favour of the correctness of their decisions. The Privy Council has declared that in a case of disputed facts when they appear to have been properly and diligently investigated in the Courts below, and their Lordships can find no palpable mistake in the appreciation by the Court below of the evidence, they never advise Her Majesty to reverse a decree which is brought before them, under such circumstances—*Chunder Monee Debia Chowdhrain* vs. *Munmoheenee Debia*, 8 Moore, 489; *Musader Mahomed Kazim Sherajee* vs. *Meerza Ally Mahomed Khan*, 6 Moore, 49; *Mudhoo Soodun Sandial* vs. *Suroop Chunder Sirkar Chowdhry*, 4 Moore, 431; and this to a great extent is the practice in India—*Heralall Chuckerbutty* vs. *Moheshchunder Ghosal*, 1 Hyde, 105; but the distinction, as laid down in *S. M. Saroda Soondery Dossee* vs. *Tincowree Nundy*, 1 Hyde, 223, is that "The rule of the Privy Council not to disturb a judgment of a Court in India upon a question of credibility of witnesses, unless it is manifestly clear from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusions drawn from such evidence [*Misadee Mahomed Cozin Sheranee* vs. *Meerza Ally Mahomed Shooshy*, 8 Moore, P. C. Cases, p. 110] however necessary as regards a Court of Appeal far removed from India, would hardly be extended, as one equally necessary and applicable with the same strictness to a Court of Appeal in India, which has the opportunity of calling witnesses and has all the advantages to be derived from a personal acquaintance with the people, their feelings, habits and character, as well as other local advantages." But see *Lallah Jha* vs. *Mussamut Bibee Tulieb Matool Zuhra*, 2 W. R., 437; *Shaikh Mahomed Saleh* vs. *Shaikh Nusseerooddeen Hossein*, id., 284.

The presumption is in favour of the judgment of the lower Court, and the Appellate Court should not interfere unless it is shown to be wrong—*Tubbo-onissa Bibee* vs. *Koomar Sham Kishore Roy*, 15 W. R., 288; *Shetabdee Biswas* vs. *Molamdee Mundul*, 25 W. R., 30; manifestly wrong—*Wise* vs. *Sunduloonissa Chowdraine*, 11 Moore, 181; and then the Appellate Court should show the grounds on which it comes to an opposite conclusion—*Munsoob Bibee* vs. *Ali Meah*, 17 W. R., 358.

A Court should not interfere with a finding not appealed against—*Kalee Doss Roy* vs. *Khiroda Soonduree Debia*, 16 W. R., 300; *Mussamut Ritooraj* vs. *Oojagur Singh*, 15 W. R., 227; *Apee* vs. *Heera Nund*, 3 Alla., 44; *Kallee Coomar Chatterjee* vs. *Kristo Kishore Poddar*, 14 W. R., 196. Thus, on an appeal as to costs only, it cannot remand the case for trial on the merits—*Muthra Pershad* vs. *Bundee Roy*, 5 Alla., 20.

An Appellate Court should not reject evidence admitted below—*Mohabeer Doss* vs. *Lalla Roy*, 1 W. R., 12; nor decide the case not on the evidence, but upon the allegations in the plaint—*Suttrooghur Puttee* vs. *Manick Ram Gangooly*, id; 199; nor dismiss the suit because it was brought as a rent suit—*Moulvi Ahmed Kubeer* vs. *Mackrae*, 25 W. R., 417; or, because the claim was greatly exaggerated—*Ram Chunder Chowdhry* vs. *Mariott*, 15 W. R., 465; nor interfere with the result of a local enquiry—*Monkee Dumber Sahee* vs. *Monkee Bhullunder Sahee*, 15 W. R., 423; especially when the Judge himself has inspected the spot—*Brindabun Bharotee* vs. *Rajah Dhununjoy Narain Bhunjo Deo*, 18 W. R., 452.

Language of judgment.

572. The judgment shall be written in English; provided that if English is not the mother-tongue of the Judge, and he is not able to write an intelligible judgment in English, the judgment shall be written in his mother-tongue or in the language of the Court.

This section applies to H. C.

See note under section 200, *ante*.

Translation of judgment.

573. When the language in which the judgment is written is not the language of the Court, the judgment shall, if any party so require, be translated into such language, and the translation, after it has been ascertained to be correct, shall be signed by the Judge or such officer as he appoints in this behalf.

This section applies to H. C.

Contents of judgment.

574. The judgment of the Appellate Court shall state—

(*a*) the points for determination;

(*b*) the decision thereupon;

(*c*) the reasons for the decision; and

(*d*) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled,

Date and signature.

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

This section applies to H. C.

Reasons.—Not the reasons of coming to any conclusion of fact, but the reasons showing upon what points of fact or law the decision runs—*Ramessur Bhuttacharjee* vs. *Shaik Bhanoo*, 12 W. R., 272.

It is incumbent on an Appellate Court to state in the judgment the differen points mentioned in this section—*Shurbessur Ghose* vs. *Sadhoo Churn Ghose* 15 W. R., 130; even if it generally confirms the decision of the lower Court—*Radha Gobind Kur* vs. *Ram Kishore Dut*, 8 W. R., 340; *Mussamut Rajoo* vs. *Raja Coomar Singh*, 7 W. R., 137; *Khettur Mohun Gossain* vs. *Bhyrub Chunder Sheet*, 3 W. R., 126; *Bhagbut Khan* vs. *Puddo Bewa*, 3 W. R., 192; *Korban Ali* vs. *Askan Ali*, 4 W. R., 4;

but where the decision of a case involves issues of fact chiefly, and the first Court has gone into the evidence carefully, the Court, if it agrees with the lower Court, is not bound to state in detail the reasons previously recited and in which it concurs—*Lalla Juggessur Sahoy* vs. *Gopal Lall*, 15 W. R., 54; *Syud Shah Ekbal Hossein* vs. *Bunse Sahoo*, 25 W. R., 12. The rule should, however, be followed strictly when the judgment of the first Court is reversed—*Kartick Napit* vs. *Personomyee Naptinee*, 2 W. R., 77; *Munsoob Bibee* vs. *Ali Meah*, 17 W. R., 358; *Shathuk Paul* vs. *Gudhadur Roy*, 4 W. R., 100; although it is not necessary to meet categorically every one of the arguments advanced by it—*Krishnendro Roy* vs. *Digumburee Debia Chowdhrain*, 16 W. R., 15; or to give a review or setting forth of the whole of the evidence—*Noor Mahomed* vs. *Zuhoor Ali*, 11 W. R., 34.

The same rule applies to judgments passed by the High Court on appeal—*Katche Kaleyana Rungappa Kalakka Tolaoodiar* vs. *Kachivijaya Rungappa Kalakka Tolaoodiar*, 12 Moore, 502.

When the Appellate Court has not recorded a proper judgment, the High Court, if the same Judge is in office, can remand the case and call upon him to record a proper judgment—*Golam Hossein* vs. *Ram Doyal Ghose*, 12 W. R., 152; *Adheen Misser* vs. *Jograj Misser*, 11 W. R., 312; or, if he cannot be found, direct a retrial—*Kresto Chunder Chuckerbutty* vs. *Ram Brohmo Chuckerbutty*, 20 W. R., 403; or a decision on the case as it stands, if that is possible—*Shunshurooddy* vs. *Jan Mahomed Sikdar*, 21 W. R., 260; *Dolee Chund* vs. *Mussamut Oomda Begum*, 18 W. R., 478. See note on section 203, *ante*.

Decision when appeal is heard by two or more Judges.

575. When the appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

If there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed:

Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it.

When there is no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed.

The High Court may, from time to time, make rules consistent with this Code to regulate references under this section.

This section applies to H. C.

The provisions of this section extend to miscellaneous proceedings, and supersedes section 36 of the Letters Patent—*Appaji* vs. *Shevlal*, I. L. R., 3 Bom., 204; then also extends to proceedings in execution—*Balaji* vs. *Manager of Estate of Mohunlal*, I. L. R., 5 Bom., 680.

Dissent to be recorded.

576. When the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing

the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

This section applies to H. C.

What judgment may direct.

577. The judgment may be for confirming, varying or reversing the decree against which the appeal is made, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be passed in appeal, the Appellate Court may pass a decree or order accordingly.

This section applies to H. C.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

578. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court.

Act VIII, 1859, section 350. This section applies to H. C.

As to the distinction between irregularity and jurisdiction, see *Combe* vs. *Edwards*, 3 Prob. Div., at p. 128.

No decree can be reversed or case remanded for any irregularity, error or defect not affecting the merits of the case or the jurisdiction of the Court, such as trying ten suits together—*Anund Moyee Chowdhrani* vs. *Sheeb Chunder Roy*, Marsh., 455; *Paran* vs. *Achal*, I. L. R., 4 Alla., 289, nor for error in valuing a suit—*Ramessur Dyal Singh* vs. *Raj Kishore Singh*, 13 W. R., 325, unless it affects jurisdiction—*Hurree Panday* vs. *Bassoo*, 11 W. R., 257, *Unanda Parsad Roy* vs. *Erskine*, 12 B. L. R., 370; and the parties have not submitted—*Tekum Lall Dass* vs. *Macarthar*, 1 W. R., 279; nor for admitting a document not properly stamped—*Bono Gopaul* vs. *Soojana*, S. D., N. W., 1863, p. 437; *Girdhar Nag Jishet* vs. *Ganpat Moroba*, 11 Bom., 135; *Roy Luchmiput Singh* vs. *Shaikh Moshuruf Ali*, 25 W. R., 80 (as to procedure in such a case . see *Manlappa Nad Gowda* vs. *Busuanuf Rao Nadgodwa*, 14 Moore, 39); See however *Safdar Ali* vs. *Lachman Das*, I. L. R., 2 Alla., at p. 559; *Chedi Lal* vs. *Kirath Chand*, I. L. R., 2 Alla., 682; *Mehdi Husain* vs. *Madar Buksh*, id., 889; unless it be the plaint when the suit must be dismissed under section 12, Act VI of 1870—*Shama Soondary* vs. *Hurro Sondary* I. L. R., 7 Cal., 348: See however *Mehdi Hossein* vs. *Madar Baksh*, I. L. R., 2 Alla., 889, nor for omission to give a detailed examination of the evidence—*Noor Mahomed* vs. *Zuhoor Ali*, 11 W. R., 34: nor because the lower Court omitted to give reasons for its decision; the case should be tried regular appeal—*Katchekaleyana Rungpapa Kalakka Oodear* vs. *Kachirigaya Rungappa Kalakka Oodiar*, 12 Moore, 502; nor because the plaintiff had not filed certain documents with his plaint or appealed for an order on defendant to produce them—*Muttoo Doobey* vs. *Sheomang Singh*, S. D., N. W., 1864, p. 593; nor because he had filed them after first hearing and on a date other than had been fixed—*Hoonooman* vs. *Tell*, S. D., N. W., 1868, p. 148; nor because the plaint was indistinct—*Jagmohun Teware* vs. *Baldeo Naik*, S. D., N. W., 1868, p. 143; *Gour Surun Doss* vs. *Kanhya Singh*, 2 W. R., 237; nor for misjoinder—section 32, *ante*; nor because the Judge instead of dismissing a suit under Act 1859, section 15, changed it into a regular suit on payment of the proper stamp—*Doorga Nath Bhadury* vs. *Rookmini Kant Bagchee*, 24 W. R., 167; nor because the wrong side began—*Makund* vs. *Bahari Lal*, I. L. R., 3 Alla., 824, nor because the Judge expressed himself wrongly in the judgment, if the decree is correct—*Ram Chunder Chatterjee* vs. *Ram Jeebun Dass*, 14 W. R., 141. Otherwise if a document declared invalid has been admitted—*Girdhur Nagjishet* vs. *Ganpat Moroba*, 11 Bom., 135; unless the judgment is based not on it, but on other grounds—*Womes Chunder* vs. *Chundee Churn*, I. L. R., 7 Cal., 293; or judgment has been delivered on evidence taken by another officer and the irregularity has not been waived—*Naranabhai Vrijbhukandas* vs. *Naroshaukar Chandroshankar*, 4 Bom., 98.

Where a corporate body was sued, not in its corporate capacity, and a decree was given not against it, but against an agent, the error was held to effect the merits of the case—*Nubeen Chunder Paul* vs. *Stephenson*, 15 W. R., 535. And where plaintiff sued without authority from his principal, and no objection was made in the first Court it was held that such objection could be raised in appeal, or in special appeal, and that the defect could not be cured by the production of a proper power in the special appeal—*Shivram Vithal* vs. *Bhogirthabi*, 6 Bom., 29. So it has been held that non-registration of a document can be raised in regular appeal—*Basawa* vs. *Kalkapa*, I. L. R., 2 Bom., 489; *Safdar Ali* vs. *Lachman Das*, I. L. R., 2 Alla., 554.

When a suit is set aside on the ground that it was of a value beyond the jurisdiction of the first Court, the plaint should be returned in order to be presented in the proper Court—*Mussamut Edoo* vs. *Shaikh Hefazut Hossein*, 13 W. R., 358.

See note on section 562, *ante*.

Of the Decree in Appeal.

Date and contents of decree.

579. The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

The decree shall contain the number of the appeal, and the memorandum of appeal, including the names and description of the appellant and respondent, and shall specify clearly the relief granted or other determination of the appeal.

The decree shall also state the amount of costs incurred in the appeal, and by what parties and in what proportions such costs and the costs in the suit are to be paid.

The decree shall be signed and dated by the Judge or Judges who passed it:

Judge dissenting from judgment need not sign decree.

Provided that where there are more Judges than one, if there be a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

This section does not apply to the H. C. in the exercise of its appellate jurisdiction.

The decree of the Appellate Court is the decree to be executed, and limitation runs from the date on which it is passed—section 583, *post*.

As to appellate decrees, and decrees generally, see note under section 206, *ante*, pp. 164—169.

The decree should state by what parties and in what proportions if necessary the cost of the suit are to be paid. This sum the Court must take for granted, and it need not go into particulars or set forth in a schedule the different items which go to make up the costs of the first Court—*Mothoora Mohun Roy* vs. *Hury Kishore Roy*, 18 W. R., 286, on review from 17 W. R., 455; *Rajah Rajkrishno Singh Bahadoor* vs. *Pranoda Dabee Raj Coomaree*, 21. W. R., 74. When an appeal is affirmed upon wholly different grounds from those relied on in the lower Court, the appeal should be dismissed without costs—*Fisher* vs. *Kamala Naicker*, 8 Moore, 170.

The Appellate Court can direct how its decree should be carried out—*Kalee Doss Sandyal* vs. *Roy Luchmiput Doogur*, 14 W. R., 145.

Where the decree of an appellate Court was in general terms, *viz.*, "That the appeal be decreed with costs," and the judgment indicated a different intention it was held that execution should not have been allowed for the whole of the claim; but confined to what was the manifest intention of the Court. In other words, the decree should be interpreted by the judgment—*Mirza Mehdee Beg* vs. *Tilala Thakoor*, 15 W. R., 530. This seems doubtful.

Copies of judgment and decree to be furnished to parties.

580. Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Court and at their expense.

This section applies to H. C.

581. A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed against, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

Certified copy of decree to be sent to Court whose decree is appealed against.

This section applies to H. C.

582. The Appellate Court shall have, in appeals under this chapter, the same powers, and shall perform as nearly as may be the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chapter V; and, in Chapter XXI, so far as may be, the words "plaintiff," "defendant" and "suit" shall be held to include an appellant, a respondent and an appeal, respectively, in proceedings arising out of the death, marriage or insolvency of parties to an appeal.

Appellate Court to have same powers as Courts of original jurisdiction.

The provisions hereinbefore contained shall apply to appeals under this chapter so far as such provisions are applicable.

This section applies to H. C.

In Appeals.—In Act VIII the words were "in cases of appeal," and these were held to limit the action of the Court to cases where the subject which was being dealt with by the Court was the actual appeal itself. This limitation has been removed—*Kali Krishna Chunder* vs. *Harihar Chuckerbutty*, 1 B. L. R., 159.

Powers.—The word "powers" is not used in the sense of jurisdiction. It means powers to grant time, to adjourn a hearing, to examine parties and pleaders, to award costs, &c.—*Kali Krishna Chunder* vs. *Harihar Chuckerbutty*, 1 B. L. R., 163; to allow a case to be withdrawn—*Gregory* vs *Dooley Chand Kundary Mull*, 14 W. R., A. O., 17; to separate misjoined suits and try them separately—*Shoroop Chunder Paul* vs. *Mothoor Mohun Paul*, 4 W. R., 109.

An Appellate Court can with consent of parties refer a case to arbitration...*Sangaralingham Pellai*, Petitioner, I. L. R., 3 Mad., 78, direct a local investigation, but not by the Judge against whose decree the appeal has been filed—*Roy Soltan Bahadoor* vs. *Mussamut Laloo Kooer*, 17 W. R., 300; or send for the Ameen and examine him—*Sheo Doyal Singh* vs. *Hodgkinson*, 24 W. R., 342; or add a respondent to the record—*Showdaminee Dossee* vs. *Ram Roodro Gangooly*, 8 W. R., 367. See however—*Ranjit Singh* vs. *Sheo Prasad*, I. L. R., 2 Alla., 487, (a person cannot claim to be added as of right—*Watson & Co.* vs. *Ranee Shuno Moyee*, 9. W. R., 259); separate suits misjoined and try them—*Shoroop Chunder Paul* vs. *Mothoor Mohun Paul Chowdhry*, 4 W. R., 109.

This section does not justify a Judge, hearing an appeal *ex-parte*, in travelling beyond the case set up in appeal and opening up the whole case—*Durga Prasad* vs. *Khairate*, I. L. R., 1 Alla., 545.

583. When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was

Execution of decree of appellate Court.

preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits.

This section applies to H. C.

The restitution which a party is entitled to receive is not restitution of every thing he has lost; he recovers what is still in possession of adversary, but not every thing else. Land sold in execution and purchased by a third party cannot be restored—see notes under sections, 572, 578, *ante*.

A Zillah Court must execute its own decrees; it has no power to direct any other Court to take up and dispose of an application for execution—*Rajeeb Ram Doss* vs. *Mahomed Haseem*, 6 W. R., Mis., 51; unless authorised under section 19, Act XVI, 1868—*Mussamut Rumdan* vs. *Beharee Lall*, 1 Alla., 200; but see—*Pulukdhari Roy* vs. *Rajah Radha Pershad Singh*, L. R., 8 Ind. App. at p. 71, and the note under section 25 *ante*, p. 53. But if the Court which passed the decree has been abolished and its duties transferred to another Court, the latter continues to possess jurisdiction to execute even after a new Court, similar to the Court which passed the decree, has been established—*Biroja Monee Burmonea* vs. *Wooma Moyee Burmonea*, 7 W. R., 124.

The decree executed is "the decree passed in appeal"—*Kristo Kinkur Roy* vs. *Rajah Burroda Caunt Roy*, 14 Moore, 489, 490.

CHAPTER XLII.

OF APPEALS FROM APPELLATE DECREES.

Second appeals to High Court.

584. Unless when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds (namely)—

Grounds of second appeal.

(*a*) the decision being contrary to some specified law or usage having the force of law;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law;

(*c*) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.

This section applies to H. C.

As to the distinction between a finding of as fact and a conclusion of law from fact see *Shepherd* vs. *Henderson*, 7 App. Cal., at p. 64; *Elliott* vs *Furquand*, 7 App. Cas. at p. 85; *Sevvagi* vs. *Chimna* 10 Moore., 151

"**May have produced.**"—This means "May not improbably have produced" and not "May by some possibility"—*Ram Chunder Chowdhry* vs. *Kashee Mohun*, 21 W. R., 57.

Jurisdiction.—The jurisdiction of the Courts in special appeal is confined to the determination of such matters of law as may arise on the special appeal—*Eshan Chunder Singh* vs. *Shama Churn Bhutto*, 11 Moore, 19. It cannot decide facts, even with the consent of parties—*Kadambinee Dassee* vs. *Doorga Churn Dutt*, Marsh., 4; nor draw any inference of fact from the evidence in the case—*Doarkadas Lalubhai* vs. *Adam Ali Sultan*, 3 Bom., 6, nor lay down any rule as to what weight should be attached to evidence—*Oomut Fatima* vs. *Bhujo Gopal Doss*, 13 W. R., 50, or to the credibility of witnesses—*Mussamut Putsahee*

Koer vs. *Sheo Pershad Ram Oopadhya*, 24 W. R., 61, though where the power Court relied on a comparison of signatures or two deeds, and it appeared to the High Court on special appeal that the signatures were dissimilar, the case was remanded—*Sreemutty Phoodee Bebee* vs. *Gobind Chunder Roy*, 22 W. R., 273. Hence if the reasons given by the first Appellate Court are such as can be rightly given, and the inferences such as can be legally drawn, the Court in special appeal cannot interfere—*Rummeezoodden Bhooyan* vs. *Joymala*, 15 W. R., 303; *Hameer Mahomed Chowdhry* vs. *Fool Mahomed Chowdhry*, 16 W. R., 311; *Muthra Dass* vs. *Magh Singh*, 2 Alla., 207; *Hurish Chunder Shaha* vs. *Hurish Chunder Paul*, 25 W. R., 325. But if the finding is based on an error in law, the special Appellate Court is empowered to reverse it—*Juggurnauth Deb* vs. *Mahomed Mokeem*, 17 W. R., 161; *Mahomed Aizaddi Shaha* vs. *Shuffi Malla*, 8 B. L. R., 26, and fully decide case if there is no legal evidence on the record to support the case of one party—*Ram Pershad Soohul* vs. *Rojunder Sahoy*, 6, W.R., 262; *Joy Ram Roy* vs. *Oomrao Roy*, 12 W. R., 431, or the remaining facts found by the lower Court are sufficient for its disposal—*Shah Pughan* vs. *Shaikh Muksood Ali*, 6 W. R., 97; *Waiganhar* vs. *Wadehar*, Bom., 194; *Mohun Chunder Dhur* vs. *Kidge*, Marsh., 381; *Joy Ram Roy* vs. *Omrao Roy*, 12 W. R., 431; but in all other cases of material error either in law or procedure, the Court from inability to determine facts must remand the case to have the error amended or for re-trial, as the case may be. Thus, if the lower Court has omitted to record reasons for the decree framed, the Court in special appeal can call on it to record them, or if the Judge appears to have been transferred, direct a new trial—*Nowabkhan* vs. *Roghoonath Doss*, 20 W. R., 474. If wrong issues have been fixed, it can fix a proper issue and send it down for trial—*Sah Koondun Lall* vs. *Makhun Lall*, 1 Alla., 247; *Goluck Chunder Dutt* vs. *Anunt Kishore Gossain*, 25 W. R., 38; or direct the lower Court to complete the enquiry if it has been inadequate—*Shagur Chunder Saha* vs. *Mohamaya*, 25 W. R., 25; or even direct a re-trial—*Chunder Monee Dossee* vs. *Modhoo Dey*, 23 W. R., 166; and this last is the usual procedure where a very material error in law procedure has been committed by the lower Court—*Shaik Charoo* vs. *Mussamut Zobeida Khatoon*, 25 W. R., 54;—*Kristobind Kur* vs. *Gunga Persad Surma*, 23 W. R., 266.

The fact that the High Court may have called for a case and decided it in regular appeal does not affect the ordinary course of appeal in execution of that decree and enable a party to claim a regular appeal when he has only the right of special appeal—*Ramanoogra Sahoy* vs. *Byjnath Lall*, 15 W. R., 164.

Limitation.—Ninety days on the appellate side and twenty days on the original side from the date of the decree appealed against—Arts. 156, 151, schedule II, Act XV, 1877; the Court can extend the time for sufficient cause—*Flowest* vs. *Sad Kootub Hossein*, 1 Agra, F. B., 100; Act XV, 1877, section 5

Who may or may not appeal.—An appeal lies from very decree unless when otherwise provided by law, and as there is no such prohibition in regard to regular appeals decided *ex-parte*, a special will lie in such cases in Bombay...*Ramhet Bachashet* vs. *Balkrishna Arabhat*, 6 Bom., 163; *Luchmidas* vs. *Ebrahim*, I. L. R., 2 Bom., 644; and Bengal—*Paran Chunder Ghose* vs. *Chukkun Lall Roy*, 20 W. R., 402; *Omda Bibee* vs. *Acowrie Singh*, 7 W. R., 425; *Tara Chand Ghose* vs. *Anund Chunder*, 10 W. R., 450; *Kali Kishore Roy* vs. *Dhununjoy Roy*, I. L. R., 3 Cal., 228; and Madras —*Modalatha*, I. L. R., 2 Mad., 75, but not in the North-West—*Lal Sing* vs. *Kunjan*, I. L. R., 4 Alla., 387.

Under the Code an appeal lies from the decree only—*Koylas Chunder* vs. *Ram Lall* I. L. R., 6 Cal., 206, and all the material findings should be embodied on it—*Niamutl Khan* vs. *Phadu Buldia*, I. L. R., 6 Cal., 319.

A person who has not an interest in a suit cannot file a special appeal. A Hindu widow and her sons sued for confirmation of her title in certain property which she claimed as separate property and both the Courts declared that it was joint and not her separate property. It was held that the sons not being affected by the finding, could not appeal—*Doorga Pershad Mohapattur* vs. *Radha Mohun Mytee*, 15 W. R., 536. In a suit for rent against A, he pleaded a transfer to B, and the latter was made a party; in regular appeal the Court decreed the rent against A, and dismissed the suit as against B. B was not allowed to appeal—*Mussamut Oognee Chowdhrain* vs. *Shaikh Keramutoollah*, 17 W. R., 219. As in regular appeal, a special appellant is affected by his relation to the other parties, to the suit. Thus one defendant cannot appeal against another—*Ramessur Ghose* vs. *Azeem Joardar* 17 W. R., 373; *Modhoo Soodun Roy* vs. *Shurno Moyee Debee*, 5 W. R., 160; *Bhugwan Chunder Banerjee* vs. *Dukhina Debia*, 8. W. R., 356.

Appeal will lie.—*Error.*—The error must be an error of law and not of fact—*Chumroo Singh* vs. *Tota Roy*, 19 W. R., 430; *Meer Mahomed Hossin* vs. *Forbes*, L. R. 2 Ind. App., 1, though an apparent finding of fact may be an erroneous inference of law—*Sevaji* vs. *Chinna*, 10 Moore., 151. An appeal will lie for discrediting witnesses for general reasons not affecting the credit of any particular witnesses—*Sheo Parshun Pandey* vs. *Brun Pandey*, 24 W. R., 251, such as disbelieving a witness because he is a Naib Patwaree—*Mackenzie* vs. *Jowahir Mahtoon*, 25 W. R., 137; or for giving an erro-

neous reason for disbelieving evidence—*Huropershad Roy* vs. *Umatara Debi*, 8 C. L. R., 449; or for a misdirection as to the effect of evidenc—*Ram Pershad Das* vs. *Raja Koer*, 5 C. L. R, 94; or for resting a decision solely on a presumption which does not necessarily arise—*Mussamut Akjoo Bibee* vs. *Koonjo Behari Lall*, 19 W. R., 287, as where a Judge held from the fact of one person carrying on a business firm, and appearing to the world to be the only person carrying it on, that there court be no other person in partnership with him—*Shoobul Chunder Kulleah* vs. *Koylash Chunder Mal*, 14 W. R., 23; or for finding a fact without evidence—*Mohun Chunder Dhur* vs. *Kedge*, Marsh., 381; *Chand Monee Dossee* vs. *Obhoy Churn Pal*, 24 W. R., 289; *Surbessur Ghose* vs. *Chota Arisoollah Mundul*, 17 W. R., 213; or for treating as material evidence what is not—*Rohee Lall* vs. *Dindyal Lall*, 21 W. R., 257; *Hunsa Kooer* vs. Sheo *Gobind Raoot*, 24 W. R., 431; or admitting an unregistered document—*Basawa* vs. *Kalkapa*, I. L. R., 2 Bom., 489; or for treating as evidence a document filed with the plaint, but not proved or entered in the list of documents admitted—*Damoo Mahta* vs. *Doya Coomaree*, 25 W. R., 101; or for starting with the assumption that certain evidence has not been produced, and it is on the record—*Mahun Hur Gobind* vs. *Joya Roy*, 24 W. R., 146; or for making assumptions without evidence, and for misconstruction of evidence—*Beharee Lall Naek* vs. *Sreeram Roy*, 20 W. R., 159; or for basing a decision on numerous errors of fact—*Poorno Chunder Chatterjee* vs. *Baboo Chunder Coomar Roy*, 24 W. R., 171; *Bibee Ameerun* vs. *Shaikh Cherag Ali*, 24 W. R., 343; or for taking an imperfect or partial view of the evidence—*Abdul Rohman* vs. *Bibee Sofy Mikhayesh Saheba*, 24 W. R., 293; or for looking at the evidence of one side only—*Mohunt Deo Surun Poory* vs. *Moonshee Mahomed Ismail*, id, 300; or for omitting to notice a presumption of fact—Anonymous, 2 Ind. Jur., O. S., 13; or for overlooking—*Shundhabun Mohunt* vs. *Shurut Chunder Roy*, 23 W. R., 160, ignoring—*Heera Lall Ghose* vs. *Kalee Dass Mookerjee*, 23 W. R., 65; *Bustee Sahoo* vs. *Jeo Narain Singh*, 24 W. R., 338; *Lutchomun Lall* vs. *Khurgo Ram*, 20 W. R., 481; *Darimbo Debee* vs. *Hurreehur Mookerj* 18 W. R., 53, misrepresenting—*Shiboo Soondurees Dossee* vs. *Chunder Kant Ghose*, 21 W. R. 217; *Koldeep Narain Singh* vs. *Rummon Singh*, 22 W. R., 278, or misconstruing evidence, oral or documentary—*Niamutoollah Khadim* vs. *Himmut Ali Khadim*, 22 W. R., 519; *Mookhya Huruckraj Joshee* vs. *Ram Lall Gomashta*, 14 W. R., 435 *Mussamut Ro p Narainnee Kooer*, vs *Ressal Sewaree*, 24 W. R., 119; *Surosatty Dossee* vs. *Umbika Nund Biswas*, 24 W. R., 193; *Odit Narain* vs. *Maharajah Maheshur Bux Singh* 1 Agra F. B., 52; *Philipps* vs. *Philipps*, 4 Q. B. Div. at p 130, see however *Hemmut Ali Khan* vs. *Nyameotoolleh*, 23 W R., 250, or for misconceiving the legal positionof the parties—*Doorga Churn Dutt* vs. *Shamanund Gossain*, 12 W. R., 376.

Appeal will lie—Defect—addmitting a rehearing after time of a case decided *ex-parte*—*Runglal Mssbr Tokhan Misser*, I. L. R., 2 Cal., 114. Abstaining from enquiring into plaintiff s title on the erroneous ground that he was the party through whom defendant claimes—*Abdool Salam* vs *Mussamut Imraloonnissa*, Marsh., 6; trying a case without framing issue—*Rewun Pershad*, vs *Jankee Pershad*, 11 Moore, 27; *Sheo Sahoy Singh* vs. *Bechun Singh*, 22 W. R., 31; *Chunder Monee Dossee* vs. *Modhoo Dey*, 23 W. R. 166, unless the parties have gone to trial knowing what the real question between them was *Mussamut Metna* vs. *Syud Fuzl Rub* 13 Moore., 583; refusing to issue a commission on insufficient grounds—*Jhotee Singh* vs *Gopal Singh*, 23 W R, 457; allowing the plaintiff in the lower Appellate Court to change his suit from one of conformation, to one for recovery of possession—*Teniput Singh* vs. *Gossain*, I. L. R., 4 Cal., 46, have been considered good grounds for special appeal.

Appeal does not lie.—A special appeal appeal will not lie from the legal exercise of a discretionary power—*Gopal Khundere Rao* vs. *Deokee Nundun*, 6 Alla., 173, nor on the mere ground that the lower Court has not recorded the reasons for its decision in the manner prescribed in this Code—*Kulumutee Koer* vs. *Jowahur Lall*, 11 W. R., 318; *Ram Sunder Dass* vs. *Mahomed Abbed*, 1 Ind. Jur., O. S. 102; nor on the weight for the reasons advanced—*Doorga Churn Sett* vs. *Shamanund Gossain*, 12 W. R., 376; nor on the weight of evidence—*Baboo Dhoondh Bahadoor Singh* vs. *Baboo Priag Singh*, 17 W. R., 314; *Munee Dutt Singh* vs. *Campbell*, 11 W. R., 278, nor from a finding as to reasonable and probable cause—*Gour Hure Doss Mohunt* vs. *Hyagrib Doss Mohunt*, 14 W. R., 425, or good faith—*Abdul Azeez* vs. *Shumsunnissa*, 11 W. R., 263; nor for disbelieving a witness on the ground that he was interested, nor for any other reason within its discretion—*Dwarkanath Dass Biswas* vs. *Muddun Mohun Chuckerbutty*, 6. W. R., 292; nor from a finding on the genuineness of a deed in evidence—*Bhugwan Chunder Banerjee* vs. *Sreemuttee Dukhina Debia*, 8 W. R., 356; nor because the Judge did not write out his judgment containing the reasons for his decision, until after the decree in appeal was passed, or even after he vacated his office—*Bhagvatsangji Jalansangji*, 4 Bom., 105; nor against the amount of damages assessed for laying a false charge—*Banee Madub Chatterjee* vs. *Bholanath Banerjee*, 10 W. R., 164; nor for misjoinder—section

32; *Hera Lall Chowdhry* vs. *Bistoo Lall Chowdhry*, 22 W. R., 288; nor where no appeal lay to the lower Court—*Hardyal Singh* vs. *Kunhya Lall*, 19 W. R., 247; *Chidambara Pillai* vs. *Kaman*, 1 Mad., 189; nor where the lower Court dismissed an appeal after hearing it on the merits, though no appeal lay—*Gholam Eshak* vs. *Hyder Mollah*, W. R., Sp. No. 46; or reversed a decision and remanded the case for re-trial instead of keeping it on its own file and framing and issue—*Gunga Monee Dassee* vs. *Issur Chunder Shaha*, 17 W. R., 465; nor because the lower Court had admitted documents insufficiently stamped—*Makbul Ahmad* vs. *Iftikharunissa*, 7 Alla., 124; *Hurchunder Ghose* vs. *Wooma Sunderee Dassee*, 23 W. R., 170; *Goluck Chunder Sein* vs. *Sheikh Khan Mahomed*, 3 W. R., Act X, 158, made or an error in valuation not affecting jurisdiction—*Kisto Churn Mojoomdar* vs. *Dwarkanath Biswas*, 10 W. R., 32, or omitted to record an opinion on an Ameen's report—*Sreemutty Bindhoo Sookolany* vs. *Joy Pradash Singh*, W. R., 1864, p. 367. Where the point is then raised for the first time, a special appeal will not lie on the ground that the plaint discloses no cause of action—*Buksh Ali Sowdagar* vs. *Joyanut Khan*, 11 W. R., 248; or has not been verified, when the defendant filed a written statement without objection...*Shama Soonduree Debia* vs. *Rohimooddeen Sirdar*, 24 W. R. 71, nor for a mistake in account...*Ram Kunt Roy Chowdhry* vs. *Kalee Mohun Mookerjee*, 22 W. R., 310; nor for hearing a case before the fixed date if the parties are present—*Hukeemunnissa* vs. *Bibee Muckdoonun*, 1 W. R., 246; nor, generally, for any error not of importance or not appealed against in the lower Court—*Achumbheet Tewaree* vs. *Bhugwant Pandey*, 1 Alla., 161, such as the admission of immaterial evidence—*Watson & Co.* vs. *Gopee Soonderee Dosee*, 24 W. R., 392.

A Vakeel cannot certify his own appeal—*Thakoor Doss Mookerjee* vs. *Ameer Mundul*, 14 W. R., 168.

Grounds of Appeal.—The grounds of special appeal should be full—*Ram Kristo Deb* vs. *Raj Chunder Surmah*, 11 W. R., 246, and specific, and should clearly indicate the error of law assigned, or the substantial error of defect in law or procedure or investigation which is imputed; and in the latter case it should be made to appear on the face of the ground of appeal that such error or defect probably produced error or defect in law in the decision on the merits, by stating what bearing the supposed error or defect had on the merits of the case—*Nund Kishore Doss Mohunt* vs. *Ram Kulpo Roy*, 15 W. R., 8; *Ramaonoogra Sahoy* vs. *Mussamut Dhondia*, 25 W. R., 140; *Secunder Sikdar* vs. *Futteh Ali*, 1 W. R., 246. The general rule as to grounds of appeal is that a party is not entitled to relief upon facts or documents not referred to or stated in the pleadings—*Mahomed Zahoor Ali Khan* vs. *Mussamut Thakooranee Rutta Kooer*, 11 Moore, 475; *Nidhoo Monee Joginee* vs. *Kishen Nath Banerjee*, 20 W. R., 442; *Dwarkanath Haldar* vs. *Huree Mohun Roy*, 20 W. R., 404, or inconsistent with them—*Eshan Chunder Singh* vs. *Shama Churn Bhutto*, 11 Moore, 7; *Jowadunissa Saludai Khandan* vs. *Jhaman Lall Misser*, 23 W. R., 158; nor any on ground which has never been considered, taken, or tried in the Courts below—*Sreemuty Dassee* vs. *Ranee Lalahmonee*, 12 Moore, 475; *Protab Chunder Burooah Roy* vs. *Collector of Gowalparah*, 22 W. R., 216; even though it be a point of law—*Lalla Jwahir Lall Pandey* vs. *Court of Wards*, 17 W. R., 214. And where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted they cannot afterwards, in a special appeal, question it, and recede from the tacit admission—*Mohima Chunder Roy* vs. *Ram Kishore Acherjee Chowdry*, 15 B. L. R., 155; *Devaji Gogaji* vs. *Godaedbhai Godobhai*, 2 Bom., 28; *Gunga Phulojha* vs. *Gopal Oopadhya*, 1 W. R., 136; and where instead of objecting to the form of a suit in the first Court they litigate on certain issues, they cannot recede from this position in special appeal—*Mahomed Hashim* vs. *Kalee Churn Banerjee*, 13 W. R., 94, and assert that the plaint disclosed no cause of action—*Buksh Ali Sowdagur* vs. *Joy Anut Khan*, 11 W. R., 248. See however—*Lachman Prasad* vs. *Bahadur Singh*, I. L. R., 2 Alla., 884, though if the suit were remanded to the first Court the appellant could do so there—*Doorgaram Roy* vs. *Rajah Nur Singh Deb*, 11 W. R., 134, a question of jurisdiction will be entertained in special appeal unless it appears clear on the face of the record—*Bapuji Auditram* vs. *Umedbhai Hathe Sing*, 8 Bom., 245, and the appellant has not waived it by not objecting—*Mohammed Hossein* vs. *Raja Akhaya Narayan Pal*, 2 B. L. R., Ap., 42. See also *Aukil Chunder Sen* vs. *Mohinee Mohun*, I. L. R., 4 Cal., 491.

Where the plaintiff in appeal to the District Court did not make it a ground of appeal that the lower Court had revived an *ex-parte* decree after the proper time, he was not allowed to make it the ground of special appeal—*Boro Khasia* vs. *Jata Sirdar*, 8 B. L. R., 78.

The plea of *res judicata*—*Muhammad Israil* vs. *Chattar Sing*, I. L. R., 4 Alla., 69, and non-registration—*Busuwe* vs. *Kulkapa*, I. L. R., 2 Bom., 489, may be taken for the first time in special appeal.

Changing Nature of suit.—An appellant should not be allowed to set up a plea directly and fraudulently repudiated in the lower Court—*Sutyabhama* vs. *Krishna Chunder*, I. L. R., 6 Cal., 55; nor raise any point not raised below though there is some evidence in support of it if by any possibility the respondent might have rebutted it—ex-parte *Firth*, 19 Ch. Div., 419; nor should be allowed to change his suit in special appeal—*Gopal* vs. *Hanmant*, I. L. R., 6 Bom., 107, such as a suit based on benamee, to one's on want of consideration—*Pariag Dutt* vs. *Brojo Koonwar*, 9 W. R., 503; on a *mowrasi*, to a right of occupancy—*Soorjo Koomar* vs. *Gungadhur Roy*, 12 W. R., 81; for property as self-acquired, to a suit for a share of it as joint-property—*Hemanginie Dasse* vs. *Pitamber Dey*, 5 W. R., 197, or as heir of A to heir of B—*Kirpa Nath Mojoomdar* vs. *Saroda Chowdhrain*, 1 W. R., 283; for property on the ground of plaintiff's father, a Hindu, having transferred it for one immoral purpose, to one for property as the joint owner under mitakshara law—*Shiu Das Narain Singh* vs. *Bhagwan Dutt*, 2 B. L. R., Ap., 15; from a suit based on *den mohur*, to one on heir-ship—*Umbika Churn Dutt* vs. *Nadir Hossein*, 11 W. R., 133. Nor unless under special circumstances from a set for confirmalion to one for recovery of possession—*Terriput Sing* vs. *Gossain*, I. L. R., 4 Cal., 46; nor from a suit for possession on a special title to one based on 12 years advise possession—*Krishna Churn* vs. *Protab Chunder*, I. L. R., 7 Cal., 560, or on possession as an occupancy ryot—*Brindabun Chunder* vs. *Dhananjoy*, I. L. R., 5 Cal. 246. And where a suit was contested on the ground whether A had purchased from B, the title of B was not allowed to be raised in special appeal—*Shaikk Ahmed Mundul* vs. *Shaikh Sonaoollah*, 8 W. R., 5; and this on the broad ground that a case should not be decided on grounds not raised in the lower Courts—*Shib Suhaye Sing* vs. *Nursingh Lall*, 22 W. R., 352; *Bunnu Lall* vs. *Shiekh Aoladh Ahsan*, id., 552; *Jugdeep Narain Singh* vs. *Deen Dyal Lall*, 20 W. R., 174, 192; *Meer Bahadoor Ali* vs. *Mussamut Suneechuro*, 6 W. R., 157. Where a Munsiff refused to examine a party's witnesses as he was satisfied without them, and the party did not raise the point when the suit was appealed—*Gooroo Doss Akhoolee* vs. *Puran Mundle*, 12 W. R., 363; *Osman Singh* vs. *Chummun Mahtoon*, 15 W. R., 87; or the first Court refused to summon his witnesses—*Onooroop Chunder Mookerjee* vs. *Heera Monee Dossee*, 11 W. R., 418; the party was not allowed to raise it in special appeal. So the competency of plaintiff to sue as agent—*Soorendro Nath Roy* vs. *Rughoobur Deyal Awustee*, 15 W. R., 392; as guardian—*Thummun* vs. *Golab Ras*, 2 Alla., 89; or as co-sharer...*Nanoo Roy* vs. *Joomuck Lall Doss*, 18 W. R., 376; whether of the value of the suit or the residence of the defendant-or any other facts, such as special damage, and which is necessary for jurisdiction, has been shewn—*Trilochun Doss* vs. *Gogun Chunder Roy*, 21 W. R., 413; (but see *Ramtarak Karati* vs. *Dinanath Mandal*, 7 B. L. R., 184; *Court of Wards* vs. *Mussamut Roop Moonjaree Kooer*, 25 W. R., 260; *Ramanund Roy Chowdhry* vs. *Urnokalee Debea*, 2 W. R., 257); whether the subject in dispute had already been decided by a competent Court—*Baker Mahomed* vs. *Sectul Chunder Sircar*, 25 W. R., 28 (but see *Mohesh Chunder Banerjee* vs. *Joy Kishen Mookerjee*, 22 W. R., 362); in these and generally in all cases where the issue sought to be raised must be taken in connection with the evidence, or appears capable of explanation, it cannot be started for the first time in special appeal—*Jan Ali* vs. *Khondkar Abdool Rahman*, 14 W. R., 421. But when the objection goes to the root of the case, as that such a suit does not lie—*i.*, or want of notice in a suit for Rejectment—*Abdulla* vs. *Subbarayyar*, I. L. R., 2 Mad., 346, or the Court has not jurisdiction, and the point manifestly arises out of the pleadings—*Kalee Mohun Chutterjee* vs. *Kalee Kristo Roy*, 11 W. R., 183; *Kristo Pershad Mookerjee* vs. *Heeralall Audhicarry*, 2 W. R., Act X, 42; *Muhammad Ismail* vs. *Chuttar Singh*, I. L. R., 4 Alla., 69, it may be raised in special appeal. Where the first Court released two defendants, the plaintiff was allowed to raise the question in special, appeal although he had not mentioned it in the first Appellate Court—*Lal Mohun Sein* vs. *Anund Mohun Chuckerbutty*, 4 W. R., Act X, 3; and where a Court admitted improperly an unregistered document in evidence, the High Court allowed the objection to be raised in special appeal, although it had not been raised in the first Court—*Omatool Fatima* vs. *Ghunnoo Singh*, 19 W. R., 23; *Basawa* vs. *Ralhapa*, I. L. R., 2 Bom., 489; but where A sued for arrears of rent at an enhanced rate, and his suit was dismissed in the first Court, and in appeal he did not demand arrears at the old rate, it was held he could not do so in special appeal —*Beejoy Gobind Bural* vs. *Janob Bromonya*, 8 W. R., 252. See note at p. 80, *ante*.

Practice.—When a case is remanded to be tried on its merits, the question of limitation cannot be entertained in the lower Court—*Mussamut Judobunsee Kooer* vs. *Mussamut Asman Kooer*, 14 W. R., 370; and a remand to try a single issue prevents the case being re-opened—*Syed Mooltan Alee* vs. *Shew Buksh*, Marsh., 603; but see *Pujee Jan Khatoon* vs. *Bykunt Chunder Chuckerbutti*, 9 W. R., 380; *Ram Chunder Surmah Chowdhry* vs. *Dagoo Khan*, 10 W. R., 339.

The first Court held the suit was barred; this decision was set aside on regular appeal and the case remanded for trial on the merits. The first Court then decreed the claim, and the Appellate Court dismissed it. In special appeal it was held that though the defendant might have appealed from the first decision of the Appellate Court on the question of limitation, he could raise the same objection in cross-appeal on the plaintiff's special appeal—In the matter of *Mirza Hummut Bahadur*, B. L. R., F. B. R., 429.

The general affirmation of a judgment in special appeal can only refer to the points raised by the appellant, and the rejection of the appeal does not necessarily affirm the other findings of fact or law incidentally arrived at by the lower Court—*Shaikh Ahmed Hossein* vs. *Mussamut Bandee*, 15 W. R., 91. Where the lower Court decided the issue of limitation against, but the other issues in favour of, the defendant, and the High Court remanded the case without passing any judgment on the issue of limitation, it was held that when the case came up again in special appeal, the Court could enter on the question of limitation—*Mussamut Phool Koomaree Bibee* vs. *Woonkar Pershad Rustoby*, 7 W. R., 67; *Man Singh Mahtoon* vs. *Bhaik Narain Mahtoon*, 19 W. R., 210.

Practice.—When it is stated in special appeal that the lower Court refused to examine witnesses, it is not sufficient to put in an affidavit to the effect that a verbal request of the vakeel to examine witnesses was refused. The general practice is for the pleaders to apply for examination of witnesses by petition—*Ramessur Bhattacherjee* vs. *Shib Narain Chuckerbutty*, 14 W. R., 419. See note under section 180, *ante*; *Raj Lukhee Debia* vs. *Gokool Chunder*, 13 Moore, 225, 226.

When a Judge states that an admission was made before him by one of the parties to the suit, the High Court cannot in special appeal enquire whether the Judge is right or wrong in making the statement—*Bykuntnath Goopta* vs. *Prosunno Moyee Dabia*, 5 W. R., 196.

Second appeal on no other grounds.

585. No second appeal shall lie except on the grounds mentioned in section 584.

This section is new. It applies to H. C.

No second appeal in certain suits.

586. No second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

This section applies to H. C.

In Bombay, when a suit is of a Small Cause Court nature, but a question of title has been gone into and decided in the first Appellate Court, a special appeal will lie—*Dikshit* vs. *Dikshit*, 2 Bom., 4; and this was the practice up to a late period in Bengal—*Pachoo Raree* vs. *Gooroo Churn Dass*, 15 W. R., 557: but now a special appeal will not lie—*Hedaetoolah* vs. *Sheikh Karloo*, 7 W. R., 73; *Mohesh Mahto* vs. *Sheik Piru*, I. L. R., 2 Cal., 470; but as this section only applies to appeals from appellate decrees and not to appeals from orders it does not prevent an appeal from an order remanding a case for re-trial—*Collector of Bijnore* vs. *Jaffer Ali Khan*, I. L. R., 3 Alla., 18.

No special appeal lies in a suit for damages of any kind below Rs. 500—*Bheenuck Lall Mahtoon* vs. *Rung Lall Mahtoon*, 11 W. R., 369; *Gopeenath Pal* vs. *George*, 6 W. R., 7; except for damages on account of withholding a receipt for agricultural rent ..*Shaybendro Geer Sunnyasee* vs. *Patoo Doss Basanea*, 23 W. R., 304; nor in a suit by an heir for personal property valued at Rs. 200, said to have been taken from his ancestor—*Kapalee Bewa* vs. *Keshram Kooch*, 11 W. R., 93; nor in a suit for the recovery of the value of fruit alleged to have been misappropriated—*Shamanund* vs. *Nund Koomar*, 4 Agra, 290.

Any Suit.—This section applies to such suits as are made cognizable under section 525 of this Code—*Mussamut Banoo* vs. *Narain Sahoo*, 13 W. R., 233; and to proceedings in execution—*Debee Pershad Sing* vs. *Syud Delawar Ali*, 12 W. R., 86.

A special appeal lies from a decree on a mortgage bond for an amount under Rs. 500, if the property is made liable—*Tripoora Soondaree* vs. *Koylas Chunder Bose*, 15 W. R., 265; but where A sued for Rs. 500 on a bond, and the suit was decreed by consent, and the decree-holder got 1½ beegas of land instead of money, it was held that this did not change the nature of the suit so as to give an appeal—*Talun Bibee* vs. *Tenoo Bibee*, 15 W. R., 65. A special appeal will lie from a decree for possession of six decrees valued less than Rs. 500, with declaration of power to execute them—*Balam Das* vs. *Babu Dwarka Das*, 7 Alla., 88; and from a decree in a suit of a Small Cause Court nature, where the suit is wrongly brought in the ordinary Court—*Debukee Nundun Sein* vs. *Mudhoo Mutlee Goopta*, 24 W. R., 478.

587. The provisions contained in chapter XLI shall apply as far as may be to appeals under this chapter, and to the execution of decrees passed in such appeals.

Provisions as to second appeal.

This section applies to H. C.

The Appellate Court in special appeal can remand a case for re-trial—*Wazeer Ali* vs. *Kalee Coomar Chuckerbutty*, 11 W. R., 228; or for a finding on an issue—*Lalla Ram Lall* vs. *Mohurput Roy*, 21 W. R., 52; and in Bengal can allow a cross appeal to be raised on any point which might have been taken by regular appeal—*Hills* vs. *Ishore Ghose*, Marsh., 151; not so in Madras—*Makudu Ravulan* vs. *Mastan Sahib*, 1 Mad., 132.

CHAPTER XLIII.

OF APPEALS FROM ORDERS.

588. An appeal shall lie from the following orders under this Code and from no other such orders:—

Orders appealable.

(1) orders under section 20, staying proceedings in a suit;

(2) orders under section 32, striking out or adding the name of any person as plaintiff or defendant;

(3) orders under section 36 or section 66, directing that a party shall appear in person;

(4) orders under section 44, adding a cause of action;

(5) orders under section 47, excluding a cause of action;

(6) orders returning plaints for amendment or to be presented to the proper Court;

This means the Court of first instance... *Bindesheri Chaubey* vs. *Nundee*, I. L. R., 3 Alla., 456.

(7) orders under section 111, setting-off, or refusing to set-off, one debt against another;

(8) orders rejecting applications under section 103 (in cases open to appeal) for an order to set aside the dismissal of a suit;

(9) orders rejecting applications under section 108, or an order to set aside a decree *ex-parte*;

(10) orders under sections 113, 120 and 177;

(11) orders under section 116 or section 245, rejecting, or returning for amendm ent, written statements or applications for execution of decrees;

(12) orders under sections 143 and 145, directing anything to be impounded;

(13) orders under section 162, for the attachment and sale of moveable property ;

(14) orders under section 168 for attachment of property, and orders under section 170 for the sale of attached property ;

(15) orders under section 261, as to objections to draft-conveyances or draft-endorsements ;

(16) orders under section 294, the first paragraph of section 312 or section 313, for confirming, or setting aside, or refusing to set aside, a sale of immoveable property ;

(17) orders in insolvency-matters, under section 351, section 352, section 353 or section 357 ;

An appeal lies from an order refusing to grant an application to be made by an insolvent —*Nubbi Bakal* vs. *Chasni*, I. L. R., 6 Cal., 168 ; 7 C. L. R., 282.

(18) orders under section 366, paragraph two, section 367 or section 368 ;

(19) orders rejecting applications under section 370 for dismissal of a suit ;

(20) orders under section 371, refusing to set aside the abatement or dismissal of a suit ;

(21) orders disallowing objections under section 372 ;

(22) orders under section 454, section 455 or section 458, directing a next friend or guardian for the suit to pay costs ;

(23) orders in interpleader-suits under section 473, clause (*a*), (*b*) or (*d*), section 475 or section 476 ;

(24) orders under section 479, section 480, section 485, section 492, section 493, section 496, section 497, section 502 or section 503 ;

(25) orders under section 514, superseding an arbitration ;

(26) orders under section 518, modifying an award ;

(27) orders of refusal under section 558, to re-admit, or under section 560 to re-hear, an appeal ;

(28) orders under section 562, remanding a case ;

An order remanding a Small Cause Court can for re-trial is appealable though none would lie from the final decree—*Collector of Bijnore* vs. *Jafar Ali*, I. L. R., 3 Alla., 18.

When a case is remanded by the lower Appellate Court and an appeal is preferred against the order of remand, the High Court is not restricted to a consideration merely of the form of the order but may examine it on its merits—*Loke Mahtoon* vs. *Ajail Lal*, C. L. R., 465.

(29) orders under any of the provisions of this Code, imposing fines, or for the arrest or imprisonment of any person except when such imprisonment is in execution of a decree.

An order enforcing a penalty under the Stamp Act is not appealable under this Clause—*Sonaka* vs. *Bhoobunjoy*, I. L. R., 5 Cal., 311.

The orders passed in appeals under this section shall be final.

This section applies to H. C.

This section does not apply to appeals or restrict them from the decision of a single Judge of the High Court to the Full Court—*Hurrish Chunder Chowdhry* vs. *Kali Sundari Debi*, P. C. 16th No. 1882.

The appeals allowed by this chapter are only appeals from orders made under the new Code, either original or appellate, upon matters arising in the course of a suit or in execution of decree.

The provisions of the Code have not restrospective effect so as to affect any right of action or of appeal existing at the time when the Code came into effect. The procedure in suits instituted after the Code came into force will be wholly subject to its provisions; the procedure in suits commenced before it came into force and pending at that time will be regulated by the previous law of final decree, and by this Code after decree, and the procedure after decree, in suits determined before the Code came into force will be governed entirely by the Code as to new proceedings but not as to proceedings already commenced, which will continue under Act VIII of 1859—*Runjit Singh* vs. *Meherban Kooer*, I. L. R., 3 Cal., 662.

No appeal lies from an order refusing to recall a certificate granted under Act XXVII, of 1860—*Namuk Persad* vs. *Nitea Lall*, C. L. R., 388; or against the order of a District Judge fixing the amount of the stamp fees, where, plaintiff not paying, suit was dismissed—*Narayan Madhavrao* vs. *The Collector of Thana*, I. L. R., 2 Bom., 145—*Manohar Gannesh* vs. *Bawa Ramcharandas*, I. L. R., 2 Bom., 219; or against sanctioning prosecution—In the matter of *Bulwunt Rai*, 6 Alla., 124; In the matter of *Ram Persad Hazara*, B. L. R., F. B. R., 426; or against an order directing a penalty to be enforced under the Stamp Act—*Sonaka Chowdhrain* vs. *Bhoobunjoy*, I. L. R. 5 Cal., 311; or refusing a mortgagor an excess payment said to have been made by him under Reg. XV of 1793—*Sreeram Chunder Banerjee* vs. *Mudhoo Soodun Roy*, 24 W. R., 17; see also 19 W. R., 122; or refusing to fine a recusant witness—*Pran Kisto Deo* vs. *Kalee Doss Deo*, 7 W. R., 460, or refusing to take additional evidence—*Golam Mukdoom* vs. *Hafeezoonnissa*, 7 W. R., 489; *Kulpo Singh* vs. *Thakoor Singh*, 15 W. R., 42, or admitting it—*Radhanath Doss* vs. *Khellut Chunder Ghose*, 17 W. R., 558; or rejecting the claim of one auction purchaser against another—*Anund Chunder Pareal* vs. *Jugut Chunder Koond*, 1 W. R., Mis., 31; or refusing to allow an appeal by A for a minor B to stand for B, he not being a minor—*Shama Churn Ghose* vs. *Tarak Nath Mukhopadhya*, 3 B. L. R. App., 115; or from an order refusing to allow an appeal to be withdrawn—*Raj Kishen Roy* vs. *Raj Kishen Deo*, 6 W. R., Act X, 24; or refusing to restore an appeal withdrawn—*Modhoomutty Debia* vs. *Dhunpat Siush*, 13 W. R., 167; or refusing to allow more evidence after the party had closed his case—*Rakhal Doss Mundal* vs. *Protap Chundar Hazrah*, 12 W. R., 455; or refusing a local investition—*Bykunt Nath Sein*, 1 W. R., 169; *Poorno Persad Roy* vs. *Chunder Chatterjee*, id., 249; or refusing to admit an appeal after time—*Roghoonath Singh* vs. *Roy Mohun Lall Mitter*, 7 W. R., 296; *Mussamut Phoolbasee* vs. *Baboo Bisheshur Pershad*, 4 Agra, 301; but see *Gopeenath Roy* vs. *Gopeenath Chatterjee*, 6 W. R., Mis., 106. An appeal lay from an order passed under section 254, Act VIII, of 1859, making a defaulting purchaser liable for the loss occasioned by a re-sale—*Ram Deal* vs. *Ram Dass*, 1 Alla., 117. See however the Calcutta cases therein cited.

A having brought a suit against B, was allowed to withdraw with leave to bring a fresh suit and also ordered to pay costs. A brought a new suit, and the Court, holding that the payment of costs had not been made a condition precedent, refused to stop the suit until the costs had been paid. *Held*, no appeal lay against such an order—*Chuttoo Sheikh* vs. *Kajn Majur Hossein*, 2 Hyde, 212.

Where on remand from the High Court for trial, the Judge considered himself bound to carry out the orders, although the parties petitioned that they had entered into a compromise before the appeal, it was held that an appeal did not lie—*Suroop Narain Pandah* vs. *Soondur Porya*, 11 W. R., 505.

No appeal lies from an order directing the issue of a *mandamus* commanding persons to make compen ation for damage—*The Justices of the Peace for the Town of Calcutta* vs. *The Oriental Gas Company*, 17 W. R., 364; but no writ of *mandamus* can now be issued—Act I of 1877, section 50.

589. An appeal from any order specified in section 588, clauses (15), (16) and (17) shall lie to the High Court.

What Courts to hear appeals.

When an appeal from any other order is allowed by this chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or, when such order is passed by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

This section applies to H. C.

590. The procedure prescribed in chapter XLI shall, so far as may be, apply to appeals from orders under this Code, or under any special or local law in which a different procedure is not provided.

Procedure in appeals from orders.

This section applies H. C.

591. Except as provided in this chapter, no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction; but if any decree be appealed against, any error, defect or irregularity in any such order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

No other appeal from orders; but error therein may be set forth in memorandum of appeal against decree.

This section applies to H. C.

There is no law in India which renders it imperative upon a party to appeal from every interlocutory order under the penalty, if he does not do so, of forfeiting the benefit of the consideration of the Appellate Court—*Maharaja Moheshur Singh* vs. *The Bengal Government*, 7 Moore, 302; *Vithal Vishvanath Prabhu* vs. *Ram Chunder Sadashiv*, 7 Bom., 149; and whether the order is subject to appeal or not the party aggrieved can impugn it in an appeal from the decree,—*Gorbe Sahoo* vs. *Premlal Sahoo*, I. L. R., 7 Cal., 148 So where an interlocutory decree was given as to interest, the appellant was allowed to contest it in appeal from the decree, although he had not appealed against the decree when delivered—*Shah Mukhun Lall* vs. *Baboo Sree Kishen Singh*, 12 Moore, 185. So also an order of remand giving one of the parties more time to produce accounts—*Forbes* vs. *Ameeroonissa*, 10 Moore, 360; and an order nominating arbitrators—*Shreenath* vs. *Ramnath*, 10 Moore, 423; an order admitting an appeal after time—*Mowree Bewa* vs. *Soorundarnath Roy*, 10 W. R., 171; and an order granting a review—*Joy Kishen Mookerjea* vs. *Parbutty Churn Ghossal*, 23 W. R., 183; *Bhyrub Chunder Surmah* vs. *Madhub Ram Surmah*, 20 W. R., 84; and even an order refusing to set aside an *ex-parte* decree—*Luchmidas* vs. *Ebrahim*, I. L. R., 2 Bom., 644, have been impeached in appeal from the decrees.

No second appeal lies from an order admitting on review, after a rehearing had been refused, a case struck off for default of prosecution—*Herdhamun* vs. *Jinghon*, I. L. R., 5 Cal., 711.

CHAPTER XLIV.

OF PAUPER APPEALS.

Who may appeal as pauper.

592. Any person entitled under this Code or any other law to prefer an appeal, who is unable to pay the fee required for the petition of appeal, may, on presenting an application accompanied by a memorandum of appeal, be allowed to appeal as a pauper, subject to the rules contained in chapters XXVI, XLI, XLII and XLIII, in so far as those rules are applicable:

Procedure on application for admission of appeal.

Provided that the Court shall reject the application, unless, upon a perusal thereof and of the judgment and decree against which the appeal is made, it sees reason to think that the decree appealed against is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

This section applies to H. C.

An application for leave to appeal in *farma pauperis* need not be preceded by separate formal application for inquiry into the pauperism of the applicant—*Kamod Poor*, vs. *Sheo Poory*, 1 Alla., 246. If the appellant is found to be a pauper and the appeal is admitted, he cannot be called on to give security for costs—*Nusseeroodeen Biswas* vs. *Ujjul Biswas*, 17 W. R., 68 [see however in the matter of *Jogendro Deb Roy Kut*, 19 W. R., 102]; but if he is not an appellant, but a respondent, and wishes to file a cross appeal, he must pay the fee before it can be heard—*Rashamonee Dassee* vs. *Chowdhry Junmojoy Mullick*, 9 W. R., 356.

The Code gives no appeal from an order refusing leave to appeal as a pauper. In one suit the High Court, on a motion from such an order, sent it back to the Appellate Court for re-consideration, with an expression of their opinion. In the matter of *Moshallah Khan*, 14 W. R., 445. See however *Harsaran Singh* vs. *Rajay* I. L. R., 4 Alla., 91.

An appeal presented on behalf of a pauper by a vakeel retained under an ordinary retainer and not authorized to sign as agent should be rejected...*Mussamut Bhugobutty Koer* vs. *Gunesh Dutt*, 21 W. R., 308.

Where a guardian obtains leave to sue in *forma pauperis* on behalf of a minor the mere rejection of the suit supplies no ground for throwing the costs of the suit on the guardian—*Baijessuree Dossia* vs. *Kissia Doss*, 25 W. R., 316.

See note to sections 401 and 404, *ante*.

Inquiry into pauperism.

593. The inquiry into the pauperism of the applicant may be made either by the Appellate Court or by the Court against whose decision the appeal is made under the orders of the Appellate Court:

Proviso.

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court against whose decree the appeal is made, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees special cause to direct such inquiry.

This section applies to H. C.

CHAPTER XLV.

OF APPEALS TO THE QUEEN IN COUNCIL.

'Decree' defined.

594. In this chapter, unless there be something repugnant in the subject or context, the expression 'decree' includes also judgment and order.

When appeals lie to Queen in Council.

595. Subject to such rules as may, from time to time, be made by Her Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained,

an appeal shall lie to Her Majesty in Council—

(*a*) from any final decree passed on appeal by a High Court or any other Court of final appellate jurisdiction;

(*b*) from any final decree passed by a High Court in the exercise of original civil jurisdiction, and

(*c*) from any decree, when the case, as hereinafter provided, is certified to be a fit one for appeal to Her Majesty in Council.

Pending the result of an appeal to the Privy Council the person who, subject to that appeal, is the owner of the estate, can sue third parties in that character—*Rajah Saheb Perhlad Sein* vs. *Baboo Budhoo Singh*, 12 W. R., P. C., 6.

No appeal is allowed as to costs—*Mussamut Keemee Baee* vs. *Luchmun Das Narain Das*, 5 W. R., P. C., 59; nor from a Criminal Case—vs. *Joykissen Mookerjee*, Petitioner, 1 W. R., P. C., 30; nor from an order under Act XL of 1858 appointing a person to be the guardian and manager of a minor—*Lutchmeeput Singh* vs. *Khoobannissa*, 14 W. R., 280, nor apparently from a consent decree—*Rogobor Doyal* vs. *E. Jolomp*, Fulton, 146.

An appeal lies from the order of a single Judge of the High Court, as to execution of a Privy Council decree for more than Rs. 10,000—*Rajah Lelanund Singh* vs. *Maharajah Lakchmissar Singh*, 14 W. R., P. C., 23. Formerly an appeal lay from the decree of a division Bench when the Judges differred, although there was a further appeal on the point of difference to the High Court—In the matter of the petition of the Court of Wards, 16 W. R., 191: but see section 507, *post*. An appeal will not lie from an order rejecting a review—*Sonder Monee Dossee* vs. *Maharaj Dheraj Mahtab Chunder*, 6 W. R., Mis., 102; *Rajah Enaet Hossein* vs. *Ranee Rowshun Jenan*, 10 W. R., F. B., but if the review were granted and a new decision passed it would be otherwise—*Lekhraj Roy* vs. *Kanhya Singh*, 18 W. R., 494. An appeal lies from orders passed under section 15 of the High Court's Act—*Girdharee Singh* vs. *Hurdeo Narain Sahoo*, 21 W. R., 263.

Under section 39 of the Letters Patent an appeal lay from any final judgment, decree or order of the High Court made on appeal, provided the sum or matter at issue was above ten thousand rupees and under it; an appeal was allowed against orders passed in execution of decree—*Mussamut Valaety Begum* vs. *Rugghoonath Pershad*, 8 W. R., 147; but in a late case Markby J., held that an order directing execution to issue against a person was not a final judgment, decree or order within clause (*a*) and declined to permit an appeal—*Jogessur Sahai* vs. *Mussamut Murach Kooer*, 1 C. L. R., 354; but see the case of *Rajah Leelanund Singh* vs. *Maharajah Lakchmissar Singh*, 14 W. R., P. C., 23, referred to above and which was not referred to in the judgment.

No appeal lies from an interlocutory order, but only from a final decree. As to what is and is not a final decree, see *Palak Dhari Rai* vs. *Radha Prasad*, I. L. R., 2 Alla., 65; *Aben Sha Salit* vs. *Cassirao*, I. L. R., 6 Bom., 260; *Jogeshur Sahoy* vs. *Mussamut Mulasho Koer*, 1 Shome, 80; *Ramadhin Mahton* vs. *Ganesh*, I. L. R., 4 Alla., 283.

596. In each of the cases mentioned in clauses (*a*) and (*b*) of section 595,

Value of subject-matter.

the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards,

or the decree must involve, directly or indirectly, some claim or question to, or respecting, property of like amount or value,

and where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law.

Value.—The value of the property is the selling or market value—*Mohun Lal Sookul* vs. *Bebee Doss*, 8 Moore, 193; 7 Moore, 428; *Lekeraj Roy* vs. *Kanhya Singh*, 1 In. Ap., 319. Though if a defendant, having the means of proving the real value of a suit, makes no objection to the plaintiff's under-valuation, and in special appeal undervalues it, he cannot be allowed to prove the real value of the estate for the purpose of appealing to the Privy Council—In the matter of *Ranee Bhugobutty Deabi*, 14 W. R., 62; but see *Lekraj Roy* vs. *Kanhya Singh*, 18 W. R., 474: In the matter of *Rajah Reednath Sahee*, 19 W. R., 191.

Value of the Subject-matter of the suit.—If the land and wasilat sued for amount to Rs. 10,000, it is sufficient—*Gooroodas Roy* vs. *Gholam Mowlah*, Marsh., 24.

Value of the Appeal.—A suit was brought to recover a zemindary in the possession of different persons under deeds of sale in execution of decree. The value of the property was, as stated in the plaint, Rs. 14,325. The Sudder Court upheld the sales so far as related to the claims of some of the defendants. The other defendants applied for leave to appeal, but it was refused on the ground that the value of their portion was only Rs. 8,215; but the Privy Council seemed to hold that the words of the old order "The value of the matter in dispute in any such appeal to Her Majesty in Council" related to the whole matter involved in the suit which was the subject of judicial enquiry in the Courts, and allowed the appeal—*Mussamut Ameena Khatoon* vs. *Radhabenod Misser*, 7 Moore, 261; *Onooroop Chunder Mookerjee* vs. *Pertap Chunder Paul*, 6 W. R., Mis., 4; but see—In the matter of *Rajah Reedhnath Sahee*, 19 W. R., 191. Where a decree was given, and the amount actually decreed *including interest* up to decree, exceeded Rs. 10,000, it was held that the matter in dispute in appeal being whether the decree was right or not, was above Rs. 10,000 in value—*Maharajah Surees Chunder Roy* vs. *Guneshchunder*, 3 W. R., P. C., 14; and so in a suit for land where the land was valued at less than Rs. 10,000, but the wasilat when added made it above Rs. 10,000, an appeal lay—*Goroo Doss Roy* vs. *Gholam Mowlah*, 1 Marsh., 25; but costs of suit cannot be included—*Doorga Doss Chowdhry* vs. *Ramanath Chowdhry*, 8 Moore, 262; *Nilmadhub Doss* vs. *Bishumber Doss*, 13 Moore, 103; nor interest after decree—*Maharajah Sutees Chunder* vs. *Greeschunder*, 3 W. R., P. C., 14.

It there are two or more suits, each less than Rs. 10,000 in value, in which separate judgments have been given, they cannot be consolidated. Each judgment, when pronounced, is final and conclusive—*Moofti Mohummud Abdoallah* vs. *Baboo Motee Chand*, 5 W. R., P. C., 34, but if there are several suits the aggregate amount of which is more than Rs. 10,000 and the decision of one governs them all, the appeal will be allowed—*Ko Kherie* vs. *Madden*, L. R., 2 P. C., 50; *Khajah Asenulla* vs. *Karoonamoye Chowdhry*, 4 C. L. R., 125.

Bar of certain appeals.

597. Notwithstanding anything contained in section 595,

no appeal shall lie to Her Majesty in Council from the judgment of one Judge of a High Court established under the twenty-fourth and twenty-fifth of Victoria, chapter 104, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being;

and no appeal shall lie to Her Majesty in Council from any decree which, under section 586, is final.

Application to Court whose decree complained of.

598. Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of.

In appeal to the Privy Council three motions are required, (1) that the petition be received, read and filed, (2) that the recognizances be entered into or deposit made, (3) that the petition be allowed—*Hurrosoondry Dossee* vs. *Cowar Kestenath Ray*, Fulton, 10.

The Court cannot receive an appeal without the security bond duly registered, as provided by rule—*Rajah Sahed Pershad Sein* vs. *Rajah Rajendro Kishor*, 7 W. R., 338. An application to appeal to the Privy Council in *forma pauperis* may be made to the High Court on unstamped paper, accompanied by a certificate of counsel that there is a reasonable ground for appeal; the usual security for costs and costs of translation must be given—*Jowad Ali*, appellant, 8 W. R., 48; a separate application should also be made to the Privy Council—*Manni Ram Awasty* vs. *Sheo Churn Awasty*, 4 Moore, 114.

Pending appeal the appellant died, and the Sudder Dewany directed the Zillah Court to take evidence and determine the right of succession. Evidence was taken and the Sudder Court entered the name of A. It was held that the validity of the order directing substitution could not be questioned in appeal, and the only remedy was by review—*Baboo Kasi Persad Narain* vs. *Mussamut Kawaldasi Kooer*, 5 Moore, 163.

Time within which application must be made.

599. Such application must ordinarily be made within six months from the date of such decree.

But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens.

The six months are exclusive of the day on which the decree was pronounced or dated—Re *Rama Narga Narain*, 13 W. R., P. C., 17. Judgment was delivered in June 1870. In July 1871, a review was applied for and rejected in September, and when rejecting it, the Judicial Commissioner gave leave to appeal to the Privy Council. It was held that the permission was *ultra vires*, as the petition to appeal was not presented within six months of the judgment complained of *Gajadhur Pershad* vs. *The Widows of Emam Ali Beg*, 15 Ben., 221. A petition presented in time and admitted, if struck off for default, can be re-admitted after six months—In the matter of *Radha Binode Mister*, Ben. F. B. R., 730.

Application must be made on the first opening day if the Court is closed and the period has expired—*Rajah Raj Kishen Singh* vs. *Huro Soonduree Dossee*, 15 W. R., 255, and the cases there referred to; see also *Luchmun Chunder Gir* vs. *Kalee Churn Singh*, 12 W. R., 293.

Petitioner applied for leave to appeal on the last day of the six months allowed to appeal, and deposited the estimated costs of translating and transmitting the record, but not the cost of printing, as required by Rule IV. The omission was not amended till after the six months, and his application was dismissed—In the matter of *Gour Surn Dass*, 19 W. R., 305.

Certificate as to value or fitness.

600. Every petition under section 598 must state the grounds of appeal, and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 596, or that it is otherwise a fit one for appeal to Her Majesty in Council.

Upon receipt of such petition, the Court may direct notice to be served on the opposite party to shew cause why the said certificate should not be granted.

No appeal lies from the order of a Judge of the High Court granting or refusing a certificate to the effect that the subject-matter of a suit is of the value of Rs. 10,000—*Mussamut Ameerunnessa* vs. *Baboo Behary Lall*, 25 W. R., 529; *Tara Chand Biswas* vs. *Radha Jeebun Mustofee*, 24 W.R., 148; *Manly* vs. *Patterson*, 9 C. L. R., 166; I. L. R., 7 Cal., 339.

If a respondent appears and does not object his costs will not be allowed; though if he objects and on his objection, the petition be amended, he will obtain his costs—*Mitter* vs. *Dossee*, Fulton, 400.

Effect of refusal of certificate.

601. If such certificate be refused, the petition shall be dismissed:

Provided that, if the decree complained of be a final decree passed by a Court other than a High Court, the order refusing the certificate shall be appealable, within thirty days from the date of the order, to the High Court to which the former Court is subordinate.

Security and deposit required on grant of certificate

602. If the certificate be granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date,

(*a*) give security for the costs of the respondent, and

(*b*) deposit the amount required to defray the expense of translating, transcribing, indexing, and transmitting to Her Majesty in Council a correct copy of the whole record of the suit, except

(1) formal documents directed to be excluded by any order of Her Majesty in Council in force for the time being;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may direct to be excluded:

and when the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in the first clause of this section, deposit the amount required to defray the expense of printing such copy.

Motion for security of costs should in all cases be made before the appeal has been admitted—*Hurr Soondry Dossee* vs. *Cowar Kistonauth Roy*, Fulton, 89.

The Court has no power to enlarge the period of six weeks—*Funendro Deb Roy* vs. *Jogendro Deb*, 23 W. R., 220. In the matter of the petition of *Soorjmukhi Kooer*, I. L. R., 2 Cal., 272.

It is doubtful if the Court can demand security for costs from appellant after the issue of notice to the respondent—*Hufazutoollah Chowdhry* vs. *Humeedhur Rohmon*, 6 W. R., Mis., 123; *Wise* vs. *Juggobundhoo Bose*, 7 Moore, 431.

Security bonds require a stamp—*Soonjharee Koonwur* vs. *Ramessur Panday*, 5 W. R., Mis., 147.

No appeal is allowed in Calcutta from the order of a single Judge granting a certificate—*Amirunnissa* vs. *Behary Lall*, 25 W. R., 529; *Manly* vs. *Paterson*, I. L. R., 7 Cal., 339. The ground of these decisions is somewhat inconsistent with the view taken by the Judicial Committee in the case of *Hurrish Chunder Chowdhry* vs. *Kali Sunderi Dabia*, P. C., 16th November 1882.

Admission of appeal and procedure thereon.

603. When such security has been completed and deposit made to the satisfaction of the Court, the Court may

(*a*) declare the appeal admitted, and

(*b*) give notice thereof to the respondent, and shall then

(*c*) transmit to Her Majesty in Council, under the seal of the Court, a correct copy of the said record, except as aforesaid, and

(*d*) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

Act VI of 1874, section 12.

There is no right to appeal to the Privy Council until the petition is admitted and allowed. If the petition is not prosecuted within a seasonable time the Court has power to remove it from the file—*Gobardhun Barmono* vs. *Srimati Munun Debee*, 3 B. L. R., 126. But if the appeal has been admitted, the High Court cannot review its order and reject it on review—*Ameerunissa Begum* vs. *Ranee Indurjeet Konwur*, 6 W. R., Mis., 97.

If the order admitting an appeal is void, because given after the time allowed to do so has expired, this objection should be taken as early as possible before the Privy Council; for, if the case is called on and the arguments entered on, their Lordships will give special leave to appeal if the appellant has a good case—*Gajadhur Pershad* vs. *The Widows of Emam Ali Beg*, 15 B. L. R., 221; *Ram Sabuk Bose* vs. *Kaminee Koomaree Dossee*, 5 Moore, 81.

See note under section 606, *post*.

Revocation of acceptance of security.

604. At any time before the admission of the appeal, the Court may, upon cause shewn, revoke the acceptance of any such security, and make further directions thereon.

Power to order further security or payment.

605. If at any time after the admission of the appeal, but before the transmission of the copy of the record, except as aforesaid, to Her Majesty in Council, such security appears inadequate,

or further payment is required for the purpose of translating, transcribing, printing, indexing, or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security or to make, within like time, the required payment.

Unnecessary documents should not be inserted in the transcript, and all expense occasioned by their insertion will be allowed—*Tarakant Bannerjee* vs. *Puddomoney Dossee*, 10 Moore, 476; and in a case in which the High Court could not be determined whether certain books and accounts were material or relevant, it declined to put the appellant to the cost of printing them, but gave the respondent the option of printing and translating them at his own expense, with a view to their being sent to England as an appendix to the record—*Rajcoomar Baboo Deb Nundun Singh*, Petitioner, 7 W. R., 90.

Razeenamahs, safeenamahs and security connected with appeals need not be translated into English if presented before the transmission of the appeal—*Meer Mahomed Tukee Chowdhry* vs. *Luchmeeput Singh Doogur*, 7 W. R., 291.

When an appeal has been filed from an order of the High Court on review, the papers relating to an application for review, if the application has been rejected, should not be transmitted with the record to the Privy Council—*Fukheerooddeen Mahomed Ashan Chowdhry* vs. *Nujmoonissa Chowdhrain*, 11 W. R., 145.

The Letters Patent creating the High Court (of Madras) provides that the reasons given by the Judges on appeal should be transmitted with the record for the information of the Privy Council at the hearing—*Katcheakleyana Rungapapa Kalakka* vs. *Kachurjaya Rungappa Kalakka*, 12 Moore., 495; *Rajah Enaet Hossein* vs. *Ranee Rowshun Jehan*, 10 W. R., F. B., 1.

Effect of failure to comply with order.

606. If the appellant fail to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of Her Majesty in Council,

and in the meantime execution of the decree appealed against shall not be stayed.

A widow's interest in her husband's property should not be taken as security—*Mussamut Phool Koer* vs. *Dabee Pershad*, 12 W. R., 187.

Where no security was given within the time limited by section 602, *ante*, the proceedings were stayed and the appeal struck off the file—*Thakoor Kapilnatt Sahai* vs. *Government*, I. L. R., 1 Cal., 142. So where an applicant deposited the estimated sum, but less the cost of transcription on the last day of the six months, his application was stayed—In the matter of *Gour Surn Dass*, 19 W. R., 305.

The High Court has the power to restore an appeal dismissed for default, or for any other reason removed from the file, after six months have expired—In the matter of the petition of *Radha Binode Misser*, B. L. R., F. B. R., 730.

Refund of balance of deposit.

607. When the copy of the record, except as aforesaid, has been transmitted to Her Majesty in Council, the appellant may obtain a refund of the balance, if any, of the amount which he has deposited under section 602.

Powers of Court pending appeal.

608. Notwithstanding the admission of any appeal under this chapter, the decree appealed against shall be unconditionally enforced, unless the Court admitting the appeal otherwise directs.

But the Court may, if it thinks fit, on any special cause shown by any party interested in the suit, or otherwise appearing to the Court,

(*a*) impound any moveable property in dispute or any part thereof, or

(*b*) allow the decree appealed against to be enforced, taking such security from the respondent as the Court thinks fit for the due performance of any order which Her Majesty in Council may make on the appeal, or

(*c*) stay the execution of the decree appealed against, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed against, or of any order which Her Majesty in Council may make on the appeal, or

(*d*) place any party seeking the assistance of the Court under such conditions, or give such other direction respecting the subject-matter of the appeal, as it thinks fit.

Security cannot be demanded before the application has been considered and an appeal has been admited—In the matter of *Burra Lall*, 16 W. R., 289.

(*b*) The High Court may, on cause being shown, require security from the decree-holder who has been put in possession in execution of a decree against which an appeal has been preferred to the Privy Council; but the exercise of such jurisdiction is not a matter of right, but of discretion, and security will not be required unless it has been shown that the party in possession is making waste, or is so embarrassed by debt that the estates are likely to be seized by creditors in satisfaction of their claims, or some such good cause—*Sooruj Monee Dayee* vs. *Sudanund Mohapattur*, 12 W. R., 296; *Mussamut Jarutool Butool* vs. *Mussamut Hoseinee Begum*, 10 Moore, 196; but see In the matter of *Burra Lall*, 16 W. R., 289. And where a decree-holder wishing to execute a decree gave security, yet did not execute the decree for some reason or other, and the decree was set aside with costs in the Privy Council, it was held that the terms of the security bond did not render the surety liable for costs or anything else awarded by the Privy Council—*Nuffer Chunder Paul Chowdhry* vs. *Soorendro Nath Roy*, 14 W. R., 410; and see *Ranee Birjobuttee* vs. *Pertaub Sing*, 3 W. R., P. C., 36. The terms of the bail bonds in these cases are not given, and probably they were to restore the property the decree-holder might take in execution.

In practice, the security is calculated at three years' mesne profits of all lands the decree-holder may take possession of—*Ameeroonissa Khatoon* vs. *Dunne*, 14 W. R., 361. The security bond (if registration is necessary) need not be registered until the security has been accepted. Thus the High Court directed a party to furnish security within two months, and on the last day allowed by the order the party tendered a durputnee mehal, and on the day following gave an unregistered security bond which the Judge refused: It

was held that the Judge should have enquired into the sufficiency of the security, and that registration was not necessary until the security had been accepted—*Dunne* vs. *Ameeroonissa Khatoon*, 13 W. R., 41.

In reporting on security a Judge should not transmit to the High Court all documents used to make out the title of the parties offering the security; but should confine himself to stating the particulars of the documents which have been produced and proved before him, and upon which the title of the surety appears to have been made out—In the matter of *Ameeroonissa Khatoon*, 14 W. R., 94.

A District Judge has no power to release a surety from security taken by the High Court in a Privy Council case, and no appeal lies from such an order. It is void—*Abedoonissa Khatoon* vs. *Ameeroonissa Khatoon*, 17 W. R., 464.

As to enforcing the security see *Banee Bahadur* vs. *Mughlia Begum*, I. L. R., 2 Alla., 604.

Quære, has the Court power to order restitution of property already taken in execution of decree pending appeal to the Privy Council—*Khajah Asanullah* vs. *Kedoonamoye*, 4 C. L. R., 125.

(*c*) It is essential to the establishment of an application to stay execution that irreparable injury will result to the applicant unless the delay be granted; and, secondly, that he has promptly made the application—*Nawab Sidhee Nuzur Aly Khan* vs. *Ojoodhyaram Khan*, 1 Ind. Jur., N. S., 185.

A appealed to the Privy Council from a decree given against him; in a second suit, he obtained a decree, and an order was issued against him to stay execution "until further orders." *Held*, if the party obtaining the decree against which A had appealed to the Privy Council attempted to execute it, the order restraining A might be modified, and the restraint withdrawn—*Dwarkanath Roy* vs. *Wooma Sooduree Dassee*, 14 W. R., 329.

A rule suspending execution pending an appeal to the Privy Council ceases to have effect when judgment is delivered and limitation begins to run—*Gonesh Dutt Singh* vs. *Mungree Ram Chowdhry*, 19 W. R., 186.

Increase of security found inadequate.

609. If, at any time during the pendency of the appeal, the security so furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

In, default of such further security being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the respondent, issue execution of the decree appealed against as if the appellant had furnished no such security.

And if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

Procedure to enforce orders of Queen in Council.

610. Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred.

Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees.

When any moneys expressed to be payable in British currency are payable in India under such order, the amonnt so payable shall be estimated according to the rate of exchange for the time being fixed by the Secretary of State for India in Council, with the concurrence of the Lords Commissioners of Her Majesty's Treasury, for the adjustment of financial transactions between the Imperial and the Indian Governments.

Limitation.—Twelve years, from the time when a right to enforce the judgment arises—Art. 180, Sch. II, Act XV, 1877—*Luchmun Persad Singh* vs. *Kishun Persad Singh*, I. L. R., 8 Cal., 218; *Kristo Kinker Ghose Roy* vs. *Burradakant Singh Roy*, 17 W. R., 292.

The application for execution must be made to the Court from which the appeal has been preferred, *i.e.*, the High Court, and proceedings commenced in any other Court are invalid—*Joy Narain Giree* vs. *Goluck Chunder Mytee*, 22 W. R., 102; *Lethbrited* vs. *Rajah Saheb Prohlad Sein*, 19 W. R., 301.

The original decree of the Privy Council is given to the successful party, and it is his duty to file the original for execution in the High Court, but this section does not limit the only possible evidence to a certified copy and an uncertified copy is sometimes admissible—*Kally Soondery* vs. *Hurrish Chunder*, L. R., 6 Cal., 594; *Hurrish Chunder* vs. *Kali Soonduri*, P. C. 16th Nov. 1882, but as a rule the decree-holder must produce a certified copy of the formal order—*Juggernath* vs. *Jadov Roy*, I. L. R., 5 Cal. 329; 4 C. L. R., 387; and a printed copy of the judgment cannot be treated as the decree and executed—*Joy Narain Giree* vs. *Goluck Chunder Mytee*, 20 W. R., 444; but when the Privy Council remits a case with directions that the Zillah Court shall arrive at certain results by certain inquiries, the object and reasons of those inquiries, as set forth in the judgment, are part of the record, and should be forwarded to the Zillah Court with the decree—*Goluck Chunder Dutt* vs. *Mohun Loll Sookul*, 5 W. R., 217. When the decree is filed, the High Court forwards it, as a rule, to the first Court, which is bound to execute it as if it were its own original decree—See *Gooroo Surun Dass* vs. *Hunoman Pershad Sahoo*, 20 W. R., 419.

Interest is not allowed without an express order—*Lekraj Roy* vs. *Mahtab Chand*, 21 W. R., 147; *Gooroo Dass Roy* vs. *Stephens*, 21 W. R., 195; *Forester* vs. *Secretary of State for India in Council*, L. R., 4 Ind. App., 187; and where a decree gave interest on the principal, and costs, no interest was allowed on the costs—*Ameeroonnissa Khatoon* vs. *Meer Mahomed Mozuffur Hossein Chowdhry*, 18 W. R. 103; *Brojo Soondures Debia* vs. *Anund Moyee Debia*, 16 W. R., 303; but in one case where the Privy Council granted costs only and said nothing as to interest, it was held that the Indian costs, but not the English, carried interest at 6 per cent.—*Nil Madhab Dass* vs. *Bissumbur Dass*, 21 W. R., 411. If interest is given, but the rate is not determined the rate granted in the lower Court should be allowed in execution—*Ameeroonissa Khatoon* vs. *Meer Mahomed Mozuffer Hossein*, 18 W. R., 103.

The word "costs" in Privy Council decrees means costs in England only—*Mussamut Omatool Fatima* vs. *Azhur Ali*, 15 W. R., 356. Costs in India are not allowed without a special order—In the matter of *Sharoda Pershad Mullick*, 18 W. R., 89. A refund of the costs, with interest at 6 per cent. will be granted on motion—*Dorab Ally Khan* vs. *Abdool Azeez*, 3 C. L. R., 358; I. L. R., 4 Cal., 229.

Mesne Profits.—When the appeal was dismissed by the Privy Council, and no order made as to mesne profits, held, the respondent was entitled to mesne profits from the date of the decree—*Gogun Chunder Sirkar* vs. *Laidlay*, 5 C. L. R., 189.

Restitution.—Restitution carries mesne profits without any express order—*Gooroo Dass Roy* vs. *Stephens*, 21 W. R., 195; *Leelanund Singh* vs. *Maharajah Lakhchmissar Singh*, 14 W. R., P. C., 23, and where a definite sum has been paid under the decree, restitution carries interest on it—*Rodger* vs. *The Comptoir D'Escompte de Paris*, L. R., 3 P. C., 465.

Special directions—A judgment of the Privy Council ordered execution for mesne profits to issue against A, and, on failure to obtain satisfaction, against B: and it was held that until all the assets of A had been exhausted no process of any kind could issue against the property of B, and that in any case B should first be called on to shew cause why execution should not issue against him on the ground that A's property had been exhausted—*Dhanput Singh Bahadoor* vs. *Forbes*, 22 W. R., 104.

The Privy Council, doubting whether the respondents to England were on the face of the plaint, entitled to the full amount claimed, left the matter to be determined by the High Court in execution, where it appeared that the doubt arose owing to the word *Shohodar* in the plaint having been wrongly translated "sons." The High Court allowed the respondents to take out execution for the whole amount —*Mozuffer Hossein Chowdhry* vs. *Ameeroonnissa Khatoon*, 17 W. R., 340.

A judgment was pronounced on the 20th of April 1870, and an appeal was allowed to the Privy Council on the 14th of May. A judgment on review was passed on the 29th of August, and was sent with the papers; but no appeal was preferred against it. Their Lordships affirmed the first judgment without prejudice to the second judgment passed subsequent to the appeal—*Toodun Singh* vs. *Poknarain Singh*, L. R., 1 Ind. App., 345.

Where a minor withdrew an appeal on coming of age, the costs of his mother and guardian, who had carried on the case, were directed to be paid out of his estate—*Ranee istoopria Putmadaye* vs. *Nund Dhul*, 13 Moore, 602.

Appeal.—An appeal is allowed to the full Court from the decision of a single Judge refusing execution—*Kally Soondury Debia* vs. *Hurrish Chunder*, I. L. R., 6 Cal., 594; P. C., 16th Nov., 1882.

Appeal against order relating to execution.

611. The orders made by the Court which enforces or executes the order of Her Majesty in Council, relating to such enforcement or execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the enforcement or execution of its own decrees.

Power to make rule.

612. The High Court may, from time to time, make rules consistent with this Act to regulate—

(*a*) the service of notices under section 600;

(*b*) the grant or refusal of certificates, under sections 601 and 602, by Courts of final appellate jurisdiction subordinate to the High Court;

(*c*) the amount and nature of the security required under sections 602, 605 and 609;

(*d*) the testing of such security;

(*e*) the estimate of the cost of transcribing the record;

(*f*) the preparation, examination and certifying of such transcript;

(*g*) the revision and authentication of translations ;

(*h*) the preparation of indices to transcripts of records, and of lists of the papers not included therein ;

(*i*) the recovery of costs incurred in British India in connection with appeals to Her Majesty in Council ;

and all other matters connected with the enforcement of this chapter.

Publication of rules.

All such rules shall be published in the local official Gazette, and shall thereupon have the force of law in the High Court and the Courts of final appellate jurisdiction subordinate thereto.

Legalisation of existing rules.

613. All rules heretofore made and published by any High Court relating to appeal to Her Majesty in Council and in force immediately before the passing of this Act, shall, so far as they are consistent with this Act, be deemed to have been made and published hereunder.

Recorder of Rangoon.

614. In sections 595 and 612, the expression 'High Court' shall be deemed to include also the Recorder of Rangoon, but not so as to empower him to make rules binding on Courts other than his own Court.

Construction of Bengal Regulation III. of 1828, section 4, clause 5.

615. The rules and restrictions referred to in Bengal Regulation III of 1828, section IV, clause *fifth*, shall be deemed to be the rules and restrictions applicable to appeals under this Code from the decisions of the High Court of Judicature at Fort William in Bengal.

Saving of Her Majesty's pleasure.

616. Nothing herein contained shall be understood—

(*a*) to bar the full and unqualified exercise of Her Majesty's pleasure in receiving or rejecting appeals to Her Majesty in Council, or otherwise howsoever, or

and of rules for conduct of business before Judicial Committee.

(*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to Her Majesty in Council, or their conduct before the said Judicial Committee.

And nothing in this chapter applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

The Privy Council is not bound by the Procedure Code—*Luchmeeput Singh* vs. *Khoobunnissa*, 14 W. R., 280.

The Privy Council can grant special leave to appeal, but they will not entertain it from a decree of the High Court when the subject-matter in suit is less thn Rs. 10,000,—*Mohun Lall* vs. *Bebee Doss*, 8 Moore., 492; *Ranee* vs. *Maharaja*, 8 Moore. 470, unless the petitioner has applied to the High Court for a certificate and has been refused—*Gungowa Kome Malupa* vs. *Erawa Korme Jogapa*, 13 Moore, 433. See however—*Mabusawung Jagavera* vs. *Vencataswara*, L. R., 1 P. C., 1. Where there has been great delay in making the application, the appellant will not get his costs—*Pattabhiramier* vs. *Vencata Row Naiken*, 15 W. R., P. C., 35; If, from any reason, the order giving leave to appeal is bad, and the appeal has been called on and the arguments commenced, the Privy Council will give special sanction, if appellant has a good case—*Gajadhur Pershad* vs. *Widows of Enamali Beg*, 15 W. R., 221; *Golam Ally* vs. *Kalikisto Tagore*, 18 W. R., 299; *East India Company* vs. *Syed Alley Khan*, 1 Kuapp, 331.

PART VII.

CHAPTER XLVI.

OF REFERENCE TO AND REVISION BY THE HIGH COURT.

Reference of question to High Court.

617. If before or on the hearing of a suit or an appeal in which the decree is final, or if in the execution of any such decree, any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

This section applies to H. C. and M. S. C. C.

It seems doubtful if this section applies to applications for review—*Bonomally Deo* vs. *Ram Sadoy Chuckerbutty*, 17 W. R., 95; but it would apply to an application for a new hearing—*Ishan Chunder Singh* vs. *Haran Sirdar*, 11 W. R., 525.

The Court cannot make a reference on a point merely on the application of the parties, unless it entertains a reasonable doubt upon the matter—*Hurish Chunder Talaputter*, vs. *O'rien*, 14 W. R., 248.

This section does not authorize a reference in a matter of probate, though when referred the High Court may deal with the case under section 264 of the Succession Act—In re *Monohur Mookerjee*, 6 C. L. R., 228.

It has been held that this section only refers to cases which cannot come before the High Court in appeal—*Krishna Nath Sirkar* vs. *Ram Kumar De*, 7 C. L. R., 144.

Court may pass decree contingent upon opinion of High Court.

618. The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or order contingent upon the opinion of the High Court on the point referred;

but no execution shall be issued, property sold, or person imprisoned in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon such reference.

This section applies to H. C. and M. S. C. C.

Judgment of High Court to be transmitted, and case disposed of accordingly.

619. The High Court shall hear the parties to the case in which the reference is made, in person or by their respective pleaders, and shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made, and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

This section applies to H. C. and M. S. C. C.

Costs of reference to High Court.

620. Costs, if any, consequent on a reference for the opinion of the High Court, shall be costs in the case.

This section applies to M. S. C. C.

Power to alter, &c., decrees of Court making reference.

621. When a case is referred to the High Court under this chapter, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed in the case out of which the reference arose, and make such order as it thinks fit.

This section applies to H. C. and M. S. C. C.

Power to call for record of cases not appealable to High Court.

622. The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity; and may pass such order in the case as the High Court thinks fit.

The High Court may under this section pass any order, it could pass in second appeal—In the matter of *Moulvi Mahammed*, I. L. R., 3 Alla., 203; see also the grounds of revision in *Sheo Dial* vs. *Prag Dut*, id., 229; *Sarnam Tewari* vs. *Sakent Bibi*, I. L. R., 3 Alla., 417; *Subraji Ranu* vs. *Palliah*, I. L. R., 2 Mad., 264; In the matter of *Bhekraj*, I. L. R., 5 Cal., 878.

The provisions of this section do not apply in the case of orders passed under section 592—*Harsaran Singh* vs. *Muhammad Raza*, I. L. R., 4 Alla., 91, or the orders granting or refusing sanction to prosecute for an offence committed before the Court—In the matter of *Madho Prasad*, I. L. R., 3 Alla., 508.

The High Court has refused to allow an appeal to be treated as an application under this section, or to act under it where the irregularity complained of was importing a judgment not on the record into the suit—*Doorga Narain Sen* vs. *Ram Lall Chuttar*, I. L. R., 7 Cal., 330.

The Court cannot act where there is an appeal—*Meer Tukee Ali* vs. *Meer Saadut Ali*, 5 Alla., 15, 137, or power to state a case—*Bell* vs. *Thakoor Doss Gossain*, 6 W. R. Mis., 26; and in any case is not bound to act under this section—*Boodhee* vs. *Alle Hyder*, 1 Alla., 271, and though the order impeached is bad, the Court may discharge the rule with costs—*Tara Chand Mundul* vs. *Bhyrub Chunder Chuckerbutty*, 15 W. R., 551; *Docowree Cazee* vs. *Hurrosoonderee Debea*, 6 W. R., Act X, 53. It empowers the Court on the *application* of the party interested—*Mahomed* vs. *Goluck Dass*, 7 C. L. R., 191, or on reference by the District Judge—*Anthony* vs. *Dupont*, I. L. R., 4. Mad., 217, to interfere in cases in which a Judge [civil or revenue—*Hurpershaud* vs. *Lalu*, 3 Alla., 60] has exercised a jurisdiction which he has no power to exercise, or in a case in which, in the exercise of a jurisdiction that he has, he exceeds his jurisdiction—In the matter of *Subjaen Ostagar*, Ben., F. B. R., 531, or has acted illegally or with material irregularity. Where an appeal is heard by a Court that has no jurisdiction this section applies—In the matter of *Rooknee Roy*, 14 W. R., 254, and if a second appeal is preferred from this decision the High Court may proceed under this section—*Bhoyrub Chunder* vs. *Wajedunnissa*, 6 C. L. R., 234, but see *Durga Narain* vs. *Goburdhun*, 9 C. L. R., 86, but see *Doorga Narain Sen* vs. *Ram Lall*, I. L. R., 7 Cal., 330, referred to above.

If a Judge hears an appeal from the order of a Deputy Collector in a rent suit under Rs. 100 in value—*Kristo Inder Roy Chowdhry* vs. *Roopinee Bebee*, 6 W. R., Act X, 56, or hears a Small Cause Court case in which an appeal does not lie—*Bhowanee Pershad Surmah Khan* vs. *Dhurm Narain Neogy*, 3 W. R., 24, the orders passed will be set aside. And where the First Court acted without jurisdiction in entering into a question, and the Superior Court wrongly heard an appeal from it, both orders were set aside—*Annamalai Chetti* vs. *Muthulinga Pillai*, 6 Mad., 360.

In reversing a Judge's order, the High Court cannot look into the legality of a Collector's order directing a sale for arrears of rent unless an appeal has been made to the Commissioner—*Sirdar Golab Singh* vs. *Ram Buddun Singh*, 4 W. R., Act X, 248.

Applications under this section should be made without delay—In the matter of *Russick Lall Chatterjee*, 15 W. R., 518; *Durga Persad* vs. *Sheo Churn*, I. L. R., 4 Alla., 155; and when the order complained of was one and a half year's old, interference was refused—*Syud Velet Hossein* vs. *Mussamut Sagrah*, 6 W. R., Mis., 96; and the applicant should be prepared to show that he did not acquiesce in the passing of the illegal order complained of—*Drobo Moyee Debia* vs. *Bipin Mundul*, 10 W. R., 6.

PART VIII.

CHAPTER XLVII.

OF REVIEW OF JUDGMENT.

Application for review of judgment.

623. Any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is hereby allowed, but from which no appeal has been preferred;

(*b*) by a decree or order from which no appeal is hereby allowed; or

(*c*) by a judgment on a reference from a Court of Small Causes,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him,

may apply for a review of judgment to the Court which passed the decree or made the order, or to the Court, if any, to which the business of the former Court has been transferred.

A party who is not appealing from a decree may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except when the ground of such appeal is common to the applicant and the appellant, or when, being a respondent, he can present to the Appellate Court the case on which he applies for the review.

This section applies to H. C. and M. S. C. C.

A petition to rectify a decree is a review—*Assur Ali* vs. *Woolfutunnissa*, 13 W. R., 33.

Decree or order.—The old law referred to decrees only—*Girdhari Singh* vs. *Hardeo Narain Singh*, 3 Ind. App., 236; *Reasut Hossein* vs. *Hajee Abdoollah*, id., 227.

An order under section 409, refusing leave to sue in *forma pauperis* may be reviewed—*Adarji* vs. *Manikji*, I. L. R., 4 Bom., 414.

Where appeal allowed but not preferred.—After an appeal has been preferred, and not after it has been "admitted" as was the case under the old law, a review cannot be admitted—*Lall Man* vs. *Manick Chand*, 2 Agra, 133; *Raj Dharee Lall* vs. *Mohadeo Singh*, 11 W. R., 511; *Baboo Sheo Nath Singh* vs. *Ram Thul Rae*, 1 Alla., 97. But if the review has been applied for in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding on the application for review by the subsequent presentation of an appeal, but is bound to come to a decision upon it—*Bharat Chunder Mozumdar* vs. *Ramgunga Sein*, Ben., F. B. R., 362. The last paragraph of this section only applies when an appeal is pending at the time of application.

No review can be entertained by the first Court after the decision of the appellate Court has been passed—*Baboo Jugger Nath Singh* vs. *Afzul Khan*, 17 W. R., 130; and a decision in special appeal precludes a review on the facts—*Jodoo Nath Mookerjee* vs. *Punchanun Mookerjee*, 14 W. R., 438.

Where no appeal allowed.—An *ex-parte* decree is open to review like other decrees, although the case may be heard under sections 108, 109, on application. The difference is, that the applicant must fail under the previous sections unless he can prove that no summons was served on him, or that he was prevented from any sufficient cause from appearing, and the merits cannot be gone into. Not so under this section—*Poresh Nath Mundul* vs. *Khetro Monee Debia*, 20 W. R., 284.

Small Cause Courts.—A Mofussil Small Cause Court may review its decisions—*Isan Chunder* vs. *Luckun Gope*, I. L. R., Cal., 699; 5 C. L. R., 569; even after the time for a new trial has elapsed—*Ratun Krishna* vs. *Raghunath Shaha*, 10 Cal., 275; I. L. R., 8 Cal., 287.

Reference from Small Cause Court.—Formerly an application for review of judgment by the High Court in such cases was inadmissible—*Doyal* vs. *Khosul Mundle*, 3 W. R., 8.

The review must be granted by the Court which passed the judgment. In the High Court it may be by the sole remaining Judge of the Division Bench deciding the suit—*Jardine Skinner & Co.* vs. *Dhun Kishen Sein*, 13 W. R., 82. An application for review of a decision passed by a Subordinate Judge was filed in the Judge's Court, received by him and forwarded to the Subordinate Judge, who rejected it. Subsequently another application was made to the Subordinate Judge who granted the application, and then the District Judge took the case on his own file and decided it It was held that the Subordinate Judge should have decided the case—*Ram Nath* vs. *Gowhur*, 2 Alla., 230.

The proper persons to certify are the pleaders who argued the case—*Toog Oung* vs. *The Br. Steam Navigation Co.*, 24 W. R., 430.

Any other sufficient reason.—The words in Act VIII were "any other good and sufficient reason," and they gave rise to numerous decisions. A subsequent decision of a question of law or of fact by the Privy Council has not been considerde sufficient—*Jadub Ram Deb* vs. *Ram Lochun Mudduk*, 19 W R., 189; *Bolakee Lall* vs. *Monjee Lall*, 17 W. R., 163; but in a case before the Privy Council, in which it was argued that an order of remand on view was illegal because the review was retained by the Court to await the decision of a Full Bench, their Lordship said as follows:—"It was, however, argued by Sir Roundell Palmer that the remand of their particular case was improper, because the suit had already been decided in the appellant's favour and ought not to have been admitted to a review, in order to give the defendants the benefit of what had been decided in other cases after such final judgment had been passed. Their Lordships, however, observe that the application for a review seems to have been regularly made within ninety days of the date of the decree sought to be reviewed, pursuant to section 377 of the Code of Civil Procedure, and this being so, their Lordships conceive that it was competent to the High Court to delay, if they did delay their final decision on that application until the point on which so much doubt existed had been settled by the judgments of the Full Bench of the High Court which have been already noticed—*Hurihar Mookapadhya* vs. *Madhab Chundra Baboo*, 8 Ben., 566; and in one case the High Court admitted a review after four years, on the strength of a Privy Council decision—*Satto Surnen Ghosal* vs. *Tarinee Churn Ghose*, 12 W. R., 154; but this has not been followed—*Punchanun Bose* vs. *Gooroo Dass Roy*, 18 W. R., 317. Probably the correct rule is, that within the period of limitation a Court would be justified in receiving a review and deciding it according to a decision binding on it or retain it until such a decision would be given on the same point; but that if the application were made later, the mere fact of an opposite decision by a superior Court would not be a sufficient cause, not for the review but for the delay in making the application, though, properly speaking, the production of an authority, to which the Judge's attention had not been called, is more a matter for appeal than review...*Shaik Ellem* vs. *Mahomed Basheer*, 24 W. R., 382. In the case of *Maharaja Moheshur Singh* vs. *The Bengal Government*, 7 Moore, 303, their Lordships referring to the power to review, said:—

"Before considering whether the review was granted in conformity with the regulations, let us look a little to the principles upon which we think lapse of time is a most important consideration. In the present case, 5½ years have passed away, since the original decision. Surely, whatever, may be the true import of the regulations, the parties interested in the decision which had been made were entitled, after the lapse of a sufficient period, no appeal having been asserted or petition for a review presented, to conclude that the Government acquired in what had been done by the Special Commissions, and in that rational conviction, to deal with the property upon the footing of the past decision. Now what are the evident consequences of delay unless justified by particular circumstances? These consequences are, that all the arrangements between man and man, concluded without any reason to suppose they were impeachable, may be set aside and thrown into confusion; producing at one time hardship to the proprietor, at another equal evil consequences to those who dealt with him; thus all such arrangements and transactions, which are the very life and soul of property, and which it is equally the interest of the Government to support and encourage, may be disturbed to the detriment of all concerned. We think for these reasons that it must have been the wish and intention, as well as the interests of Government, so to frame the regulations that their principles should be carried into effect, and that after a decision was passed unquestioned by appeal its finality should be left in doubt no longer than the requisites of justice imparatively demanded."

The meaning to be attached to the words "good and sufficient reason" have been lately the subject of discussion in the Privy Council, in the case of *Reasut Hossein* vs. *Hadjee Abdoollah*, L. R., 3 Ind. App., 221, in which the Judge of Gya, having refused an application to register a document, an order of review was granted by the Judge's successor within ninety days; the High Court set it aside as made *ultra vires*. In appeal their Lordships said:—

"Their Lordships, looking to the original application to review, are by no means satisfied that it does not contain enough to give the Judge, cognisance of the matter upon the strictest construction of Act VIII of 1859. They allude particularly to the ninth ground of the petition which refers to certain deeds, and to certain evidence which seems to have been tendered in the course of the enquiry before *Mr. S. H. C. Taylor*, and rejected by him as unnecessary. That evidence, if not very material to the general question, was by no means immaterial with reference to one ground which the learned Judge gave for rejecting the application, because he dealt with the fact of one deed being for consideration, whereas that which was propounded was not for consideration. Therefore if he allowed that matter to influence his judgment it seems to be reasonable that the parties should have the opportunity of explaining those circumstances, and of having that evidence which he refused to admit, brought before the Court on review; the evidence in fact would be in the nature of evidence which they have been from some cause prevented from adducing on the original hearing." Their Lordships, however, do not rest their decision upon that narrow ground, because looking to the extreme generality of the terms used in these sections, particularly to their terms, "other good and sufficient reason," and "necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice," they are not prepared to say that there is an absolute defect of jurisdiction whenever the parties have failed to show that there was either positive error in law or new evidence to be brought forward which could not be brought forward on the first hearing. They do not consider that the case in the *Indian Jurist*, *Nusseeroodeen Khan* vs. *Indernarayan Chatidury*, 1 Ind. Jur., 147, and the other cases cited, only limit the discretion of the Court in saying what reason is good and sufficient, or what may be so far requisite to the ends of justice, as to support an application for review. Upon an appeal, where an appeal lies, it may be open to the Court of appeal to say that the Judge ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case the Appellate Court reverses the order, because the Judge has erred in the mode in which he has exercised a judicial discretion; in the latter case it quashes the order, because there was no discretion at all to be exercised." This decision has introduced a great change in the manner of looking at reviews. It asserts that admitting a review in time is a matter of discretion, which can only be set aside by the Courts empowered to control its exercise, that is to say, the first Appellate Court in all cases—*Bhyrub Chunder Surmah* vs. *Madhub Ram Surmah*, 20 W. R., 84; *Madho Das* vs. *Bakruan*, I. L. R., 2 Alla., 287; and the Courts in special appeal, when the discretion is exercised contrary to law, or the error affects the merits of the case—*Roy Mekraj Bahadoor* vs. *Beejoy Gobind Burral*, 23 W. R., 438; and if there was legal evidence on which the order could be granted, the Court in special appeal cannot interfere—*Sahebjan Bibee* vs. *Syud Sufdur Ali*, 22 W. R., 289.

When a Judge granted a review on the ground that by going through the evidence a second time he might come to a different conclusion—*Chunder Churn Awgrodaney* vs. *Loodnarain Deb*, 25 W. R., 324; or that he has come to a different conclusion from that arrived at by his predecessor—*Roy Megraj* vs. *Beejoy Gobind*, I. L. R., 1 Cal., 197; *Ellem* vs. *Basheer*, I. L. R., 1 Cal., 184; *Shamsher Ali* vs. *Koorkut Shah*, 6 C. L. R., 550; but *Abdu' Rahman* vs. *Rada Rai*, I. L. R., 1 Alla., 363, or in order to hear the case re-argued—*Koleemooddeen Mundul* vs. *Heerun Mundul*, 24 W. R., 186; the order will be set aside in special appeal and even on revision—*Raman* vs. *Thakaram*, I. L. R., 2 Mad., 11, but if a Judge omits to consider the effect of important documentary evidence, which materially affect the case it is a good ground—*Mahadeva* vs. *Sappani*, I. L. R., 2 Mad., 396.

A party applying for review of an order refusing leave to sue as a pauper must file a copy of the order, together with a memorandum of objections—*Adarji Edulji Golakhana* vs. *Manikji Edulji*, I. L. R., 4 Bom., 414.

Review Refused.—Where an issue was laid down by the Court and sent down for trial without objection, a review was refused—*Jaggobundhoo Bose* vs. *Wise*, 12 W. R., 409. Where the applicant applied on the ground that he had obtained new evidence, namely, authenticated copies of documents, but knew previously where they had been filed—*Brojendro Coomar Roy Chowdhry* vs. *Wise*, 19 W. R., 130; and where he applied on the ground that he had obtained copies of records, and there was

no affiavit that the documents were not available before, or had been identified with the lands—*Ram Dhun Chuckerbutty* vs. *Joy Narain Panjah*, 12 W. R., 536; and where he applied by a petition to which were annexed ancestral documents presumably in his possession, and the petition did not state that the documents had been discovered ince the decrees—*Dwarkanauth Chowdhry* vs. *Kishenlall Chowdhry*, Marsh., 553, the applications were refused.

If a Court has omitted to decide an issue argued before it—*Wise* vs. *Hera Lall Giri Gossain*, 16 W. R., 150; *Hasan Ali Chowdhry* vs. *Nassirooddeen*, id., 134; or has made an error in calculation—*Mirza Akbur Ali* vs. *Mullick Mukhdoom Buksh*, 25 W. R., 3; see however—*Joy Kishen* vs. *Ataor Rahman*, 10 I. L. R., 6 Cal., 22, the remedy is by review and not by special appeal.

To whom applications for review may bemade.

624. Except upon the ground of the discovery of such new and important matter or evidence as aforesaid, or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.

This section applies to H. C. and M. S. C. C.

The difference between a review and an appeal has been pointed out by the Privy Council as follows:—It must be borne in mind that a review is perfectly distinct from an appeal; it is quite clear from the regulations that the primary intention of granting a review was a reconsideration of the same subject by the same Judge, as contradistinguished to an appeal which is a hearing before another tribunal. We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected or unavoidable cause might prevent the Judge, who made the decision, from reviewing it; but we do say that such exceptions are allowable only *ex necessitate*. We do say that in all practicable cases the same Judge ought to review—*Maharajah Moheshur Sing* vs. *The Bengal Government*, 7 Moore, 304. The present section embodies the spirit of the Privy Council decision, and declares that, except on the ground of (1) now matter, or (2) clerical error, no Judge outside the High Court can review the judgment of another Judge—See *Roy Megraj Bahadur* vs. *Beejoy Gobind Burral*, 23 W. R., 438. He cannot do so, as regards the weight of evidence—*Wolfut* vs. *Nusrutoollah*, 25 W. R., 48; or because he would arrive at a different conclusion on the facts—*Banee Madhub Bose* vs. *Kalee Churn Singh Roy*, 24 W. R., 387, or considers that his predecessor misconceived the main facts of the case—*Gour Huree Shaha* vs. *Rash Monee*, 20 W. R., 313; *Sheikh Moneerooddeen* vs. *Kadir Buksh*, 24 W. R., 410, or that an authority in the case was not produced at the hearing—*Ellem* vs. *Basheer*, I. L. R., 1 Cal., 183; *Roy Meghraj* vs. *Beejoy Gobind*, I. L. R., 1 Cal., 197; *Raman* vs. *Karunatha*, I. L. R., 2 Mad., 11; *Behari Lall* vs. *Mungolanath*, I. L. R., 5 Cal., 110.

"**Shall be made**":—That is, shall be heard or determined, not merely, presented—*Pancham* vs. *Jhinguri*, I. L. R., 4 Alla., 278.

Form of applications for review.

625. The rules hereinbefore contained as to the form of making appeals shall apply, *mutatis mutandis*, to applications for review.

This section applies to H. C. and M. S. C. C.

Application when rejected.

626. If it appear to the Court that there is not sufficient ground for a review, it shall reject the application.

Application when granted.

If the Court be of opinion that the application for the review should be granted, it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion:

Provided that—

(*a*) no such application shall be granted without previous notice to the opppsite party, to enable him to appear and be heard in support of the decree a review of which is applied for; and

Proviso.

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation.

This section applies to H. C. and M. S. C. C.

This section does not apply to judgments on review; but only to orders admitting or rejecting reviews—*Apcar* vs. *Howah Bye*, 1 Ind. Jur., N. S., 237. Where the application is refused, nothing in the judgment rejecting the application can affect the previous decree—*Ramhurry* vs. *Mothoor Mohun*, 20 W. R., 450.

The Judge should record his reasons for admitting the review, but if he omits to do so, the act is not void as done without jurisdiction—*Asrufoonissa Begum* vs. *Syud Enayet Hossein*, 13 W. R., 439; *Gunesh Ram Surmah* vs. *Rohinee Dassee*, 14 W. R., 236; and the proper procedure would be to deal with it on the same principle on which cases of unrecorded judgments are dealt with, and to remand the suit with a direction that the Judge should record his reasons.

Before a suit can be reviewed notice should be served on the opposite party, appointing a day on which he may appear in support of the original decree—*Huro Mohun Mookerjee* vs. *Mohendronath Ghose*, 16 W. R., 135; and the case should not be reheard until cause has been shown and the review granted—*Rajendro Protab Shahee* vs. *Bhowabul Singh*, 14 W. R., 105.

But where an application was made to review an order rejecting a special appeal, and it was opposed on the ground that no notice had been given, the Court held that the application to appeal being *ex-parte*, notice was not necessary—*Joy Koomar Dutt Jha* vs. *Esharee Nund Dutt Jha*, 18 W. R., 475. It is worthy of notice that clause (*a*) only mentions decrees; orders are not referred to in it.

New matter.—This section contemplates, first, a decision on the matter referred to in (*b*); and, secondly, an order admitting the appeal. Both may be recorded in the same proceeding—*Aujoonissa Bibee* vs. *Surjakant Acharjee*, 11 W. R., 56. As to new matter, see special appeal. See note on section 624, *ante*.

Special appeal—The High Court in special appeal has no power to grant review on discovery of new evidence—*Nanabhai Valabhdas* vs. *Nathabhai Haribhai*, 9 Bom., 89. See also *Jackammal* vs. *Palneappa Chetty*, 5 Mad., 464; *Punchanan Mookerjea* vs. *Radha Nath Mookerjee*, 4 Ben., 313; *Bhyrub Nath Toce* vs. *Kally Chunder Chowdhry*, 16 W. R., 112.

Strict Proof.—The applicant must satisfy the Court by strict proof, unless the other side does not object—*Ram Joy Goopto* vs. *Sreemutty Jugodessuree*, 22 W. R., 399, that the fresh evidence was not known to the applicant before judgment, or could not be obtained by him at the time of the original trial—*Omroa Thakoor* vs. *Gocool Mundul*, 16 W. R., 7; *Nuffer Chand Paul Chowdhry* vs. *Sandes*, 10 W. R., 432; *Nissa Bibee* vs. *Abdhoor Rohman*, 18 W. R., 413; *Goor Dyal Roy* vs. *Deka Noonyi*, 22 W. R., 446; and if the application is based solely on discovery of new evidence, and the Court has admitted it without proof, the order cannot be supported on the ground that the Judge admitted the application for sufficient reason—*Tekait Khood Narain Sing* vs. *Toolsee Roy*, 15 W. R., 9; *Khelat Chunder Ghose* vs. *Pran Kristo Roy*, 12 W. R., 461; *Omrao Thakoor* vs. *Gocool Mundul*, 16 W. R., 7. An unverified petition would not be sufficient evidence; whether an affidavit would be sufficient has once been doubted—*Nudar Chand Bhooya* vs. *Reedoy Mundul*, 17 W. R., 458; but in any case an affidavit that the applicant did not know of the existence of the new evidence, but not stating that he had used deligence and made enquiries is insufficient—*Seetanath Ghose* vs. *Shama Soonduree Dossee*, 14 W. R., 26. The Court must be satisfied that it has come to the knowledge of the applicant and his agents for the first time since the period at which he could have made use of it in the suit, and could not by reasonable diligence have been discovered sooner; for nothing can be more mischievous than to allow the principle to prevail that a suitor should endeavour to get a case heard on imperfect evidence and trust to succeeding on that evidence, and then when it is found that he has not succeeded to bring forward further evidence—*Land Credit Co. of Ireland* vs. *Lord Fermoy*, L. R. 5 Ch., 768, note. To this general rule there appears one exception. An applicant applying for a review, on the ground of error in construing a document, is entitled

to file new evidence to show the Court that an error had been committed, and the objection that he did not produce it previously will not avail, as it was not necessary in order to prove his claim—*Gunesh Ram Surmah* vs. *Rohinee Dossee*, 14 W. R., 236.

New Evidence.—The new matter must be relevant and material, and such as might probably have occasioned a different determination—*Heera Lall Ghose* vs. *Ram Taruck Dey*, 23 W. R., 323.

In appeal from a decree, the Courts will presume that the Judge admitting a review has acted according to law, although there is nothing on the record to sho it—*Awkkul Sahoo* vs. *Abdool Guffor*, 18 W. R., 15. This decision seems somewhat opposed to the case of *Gunganarain Roy* vs. *Gonomonee*, 8 W. R., 184; (approved of by the Privy Council, L. R., 2 Ind. App., at p. 268) in which Peacock, C. J., said: "Suppose an appeal has been preferred, the Principal Sudder Ameen would have no power to enquire whether there were sufficient grounds for admitting a review or not. If a Principal Sudder Ameen were to admit a review after an appeal has been preferred, his subsequent proceedings would fall to the ground, so I apprehend his subsequent proceedings must equally fall to the ground if he were to grant a review upon an application made after the expiration of 40 days without showing that he was satisfied that there was sufficient grounds for the delay. *Not having stated that he was satisfied* that there was just and reasonable cause for the delay, I think that, according to a fair and reasonable construction of section 378, his order granting the review was without jurisdiction, and consequently cannot be final.

Extent of Review.—When a review is granted in Bombay the whole case is re-opened —*Sainal* vs. *Dullubh*, 10 Bom., 360, in Bengal only to the extent allowed by the rule granting the review—*Dhuronidhur* vs. *The Agra Bank*, I. L. R., 5 Cal., at p. 89; but the Court may enlarge the scope of the rule on oral application—*Bhugawandeen Doobey* vs. *Myna Baee*, 11 Moore, 487.

Rules regarding Reviews in Calcutta High Court.

The existing rules relating to reviews of judgment are hereby rescinded.

Every Division Court shall sit one day, and, if necessary, oftener, in each month, to hear applications for review of its judgments.

Applications for review of judgment shall set forth plainly and concisely the grounds on which a review is sought, and shall contain a certificate by an Advocate or Vakeel of the Court, similar, *mutatis mutandis*, to that prescribed in cases of special appeal: when the application is not so certified, the Deputy Registrar shall not file the same, but return it to the party that he may present it in open Court.

Every application for review shall be accompained by a copy of the judgment or order complained of; and when the application proceeds on the ground of a discovery of new matter or evidence, the documents, if any, relied upon, shall, if possible, be annexed to the application, and the name or names of the witness or witnesses to be examined, if any, together with a declaration setting forth the circumstances under which such discovery has been made.

High Court, &c. the 6th December 1873.

Every application for review of judgment shall be submitted in the first instance, within the period prescribed by law, to the Deputy Registrar or other proper officer of the Court, who will certify thereon, whether the petition is within time and properly stamped, and within seven days from the date of such certificate, it shall be presented either by the party in person or by Counsel or Vakeel, by way of motion in open Court to the Judges whose judgments it is proposed to review, or if such Judges should not be sitting together, to the senior of them, who may then be attached to the Court and present.

Applications for review of the judgments of Division Courts, or of single Judges, where such Judge, or both the Judges, forming the Division Court, have left the High Court, shall be submitted, in the first instance, to the Chief Justice, or to the Judge whom he shall appoint to hear such applications.

Where the application is for a review of the judgment of a single Judge, the application shall be heard, and may be granted, by that Judge; but in no other case shall a review of the judgment of a single Judge be granted, save on a hearing by at least two Judges.

No review of the judgment of two or more absent Judges shall be granted except on a hearing by a greater number of Judges.

Three clear days' notice shall be given of each intended sitting of a Division Court for the purpose of hearing applications for review; and the Court shall sit from day to day till such applications have been concluded, unless the Court shall otherwise order.

Application for review in Court consisting of two or more Judges.

627. If the Judge or Judges, or any one of the Judges, who passed the decree or order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause, for a period of six months next after the application, from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

This section applies to H. C. and M. S. C. C.

Application when rejected.

628. If the application for a review be heard by more than one Judge and the Court be equally divided, the application shall be rejected.

If there be a majority the decision shall be according to the opinion of the majority.

This section applies to H. C. and M. S. C. C.

Order of rejection final. Objections to admission.

629. An order of the Court for rejecting the application shall be final; but whenever such application is admitted, the admission may be objected to on the ground that it was

(*a*) in contravention of the provisions of section 624,

(*b*) in contravention of the provisions of section 626, or

(*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in the suit.

Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, if it be proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court may order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

No order shall be made under this section unless the applicant has served the opposite party with notice in writing of the latter application.

No application to review an order passed on review or on an application for a review shall be entertained.

This section applies to H. C. and M. S. C. C.

Final.—An order rejecting a review is not liable to an appeal—*Banee Ram* vs. *Hossein Ali*, 11 W. R., 184; nor subject to review—section 629; and there is no subsequent decree that can be appealed. It is therefore final. Thus where a pleader was allowed to withdraw a case, and an application subsequently made to re-admit the appeal on the ground that the pleader had not been authorised to withdraw it was refused, it was held that no appeal lay from the order—*Modhoo Muty Debia* vs. *Dhunput Sing*, 13 W. R., 167. But though the order is final, it does not appear to prohibit the admission of a subsequent application for review on a different ground. In the case of *Nusseruddeen Khan* vs. *Indro Narayan Chowdhry*, Ben., F. B. R., p. 370, Peacock, C. J, said:—"*4thly*—Where there is an order for rejecting the application, I think that order is not absolutely final, and that it is in the judicial discretion of the Court to say that, notwithstanding it has rejected the application on one ground, is it not precluded from admitting it on another ground. It may happen that after a review has been rejected on a point of law, new evidence may be discovered which was not within the knowledge of the applicant at the original hearing on review; surely there is no reason for refusing to admit a review upon the ground of the new evidence, simply because it has been rejected on a point of law, if the Court thinks a review necessary for the ends of justice." But no second application should (save in very exceptional cases) be granted on the ground of any question of fact or law which might have been brought before the Court in the previous application, *Id.*, p. 372. In Madras, a second application is not allowed—*Vencama Shettg* vs. *Pamoo Shetty*, 5 Mad., 323.

As to applications rejected on default by non-appearance, see the case of *Nussuruddeen Khan* vs. *Indro Narayan Chowdhry*, Ben. F. B R., p. 369.

(*c*) There is a great difference between reviews granted on application made before, and on those made after the period of limitation has expired. In the former case the Court has for the time uncontrolled power, whether the Judge is the same or not, provided section 624 is not violated, and his order cannot be set aside as made without jurisdiction, although it is subject to be set aside in appeal—*Reasut Hossein* vs. *Hadjee Abdollah*, 3 Ind. App., 221; *Mussamut Montorra* vs. *Allak Roy*, 11 W. R., 197; and where the Judges of the High Court had, in the opinion of the Privy Council, improperly admitted a review, their Lordships held that it would not be right to exclude the evidence from their consideration—*Raj Lukhee Debea* vs. *Gokool Chunder Chowdhry*, 13 Moore, 226. But where a review has been granted after the period of limitation, without proof that it was shown to the satisfaction of the Court that there was sufficient excuse for not having made the application in time, all subsequent proceedings must be set aside as erroneous and invalid—*Luchman Singh* vs. *Shomshere Singh*, 2 Ind. App., 69; *Gunganurain Roy* vs. *Gonomnee*, 8 W. R., 184; *Shama Churn Chuckerbutty* vs. *Bindabun Chunder Roy*, 9 W. R., 1881, Ben. F. B. R., 900; and as made without jurisdiction—*Syud Fuzzul Hossein* vs. *Eneat Ali*, 12 W. R., 268; *Gour Pershad Surmah* vs. *Aujub Ali*, 24 W. R., 294; *Burra Fukeer Doss Bera* vs. *Fukeer Doss Bera*, 20 W. R., 180; and may, it has been held, be set aside on motion In the matter of *Sreenath Chowdhry*, 18 W. R., 286. And even if it is shown in record that the lower Court was satisfied as to the sufficiency of the excuse, this finding can be set aside in regular or even special appeal—*Shama Churn Chuckerbutty* vs. *Bindabun Chunder Roy*, 9 W. R., 181. Where a review was admitted after time simply for the purpose of allowing the plaintiff to suplement his case, the review was set aside in special appeal—*Jhubhoo* vs. *Sahoo Mussamut Jusada Kooer*, 17 W. R., 230; and so a review, and subsequent proceedings were set aside in special appeal, as it appeared the review had been granted on the ground that a similar decision of the Court had been set aside in appeal—*Roy Goodur Sahaye* vs. *Achebur Lall*, 13 W. R., 120. But when a Judge after 90 days, applied for a mere clerical amendment of a mistake in a decree, it was allowed to pass unchallenged though no reasons were given for the delay—*Zohoor Hossein* vs. *Mussawut Sydedun*, 11 W. R., 142; *Modhoo Suddun Ghose* vs. *Romanath Ghose*, 12 W. R., 63; and it has been held that a Court is competent to review a decree in which, from any error or omission, it has not ordered the amount of the decree to be paid by instalments, or when it is otherwise requisite for the ends of justice that such an order shall be made; in other cases it cannot be done without the consent on the judgment-creditor —*Ravichand Dalichand* vs. *Motilal Narvaram*, 4 Bom. 77.

Registry of application granted, and order for re-hearing.

630. When an application for a review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

This section applies to H. C. and M. S. C. C.

The Court that made the order admitting the review can allow the applicant to enlarge his grounds in the oral application if satisfied that there is a proper case on the merits for so doing.—*Bhugwandeen Doobey* vs. *Myna Baee*, 11 Moore, 498; (but see *Byjnath Sahoy* vs. *Wazeer Narain*, 24 W. R., 427; it was there decided that a Court could not give a fresh decision on a point decided, and on which no application has been made). The Court in short possesses a discretion as to the extent to which the review should be carried. In each case it must consider whether a review is necessary to correct any error or omission, or is otherwise requisite for the ends of justice, and there is no such rule as that no point can be raised on review which has already been discussed and decided in the original hearing, or that no new point which has not been raised at the hearing of the appeal can be argued on the application for review.—*Chinta Monee Paul* vs. *Pearee Mohun Mookerjee*, 15 W. R., F. B., 1. But although an applicant is not debarred from asking a rehearing of the same matter, he cannot claim the indulgence as of rsght, and it lies on him to show some good ground for the indulgence asked for—*Huree Pershad Mundul* vs. *Baboo Nund Kishun Singh*, 17 W. R., 479. As a review re-opens the case, an appeal lies and limitation runs from the final order on review—*Roop Kalee Kooer* vs. *Doolar Pandey*, 20 W. R, 101; *Ahmed Hossein* vs. *Mussamut Bundhoo*, 13 W. R., 139; *Bulobhuddur Mahantee* vs. *Mudhoosoodun Pandey*, 23 W. R., 433; but if the application has been rejected and not admitted, time runs from the original decree, though probably the existence of an apylication for review would be looked upon as sufficient reason for not appealing sooner. A applied for a review, the application was set down for argument and rejected. A subsequently within six months of the final orders, but more than six months from the date of the decree, applied for leave to appeal to the Privy Council; it was refused. Peacock, C. J., said:—"If a review is admitted then under section 380 the case is set down to be reheard and the order of the Division Bench upon the rehearing is a new decree, whatever may be the result of the rehearing. But as it is, the Court merely rejected an application to review their own judgment; and that rejection is not an order made on appeal. Consequently the Court is not in a position to admit an appeal against that order. It cannot admit an appeal against the orignal judgment of the Division Bench, inasmuch as the petition of appeal was not presented within the period of six months prescribed by the rules of Her Majesty in Council."—*Soudaminee Dossee* vs. *Moharaja Dheraj Mohatab Chand Bahadoor*, Ben., F. B. R., 586.

Where a party obtained a review on the ground that upon the record he was entitled to the full relief which he sought, the other side was not allowed to adduce new evidence—*Banee Madhub Laha* vs. *Shahjada Pakaktur*, 20 W. R., 225.

Where a review was granted for the purpose of seeing whether a chitta ought to be admitted and the case was remanded for rehearing, it was held that it was too late to object to the admission of the chitta in appeal from the judgment passed on the rehearing—*Mukhun Kooer* vs. *Tincowree Dutt*, 14 W. R., 22.

Final order.—If the Judge on review modifies or alters the original order, even the rectification of a clerical mistake, the modified order become the final order or the case, from which limitation runs Reviews for clerical mistakes should therefore be dismissed with leave to apply under section 206, *ante*—*Joykishen* vs. *Ataoor Rahman*, I. L. R., 6 Cal., 22.

PART IX.

CHAPTER XLVIII.

SPECIAL RULES RELATING TO THE CHARTERED HIGH COURTS.

This chapter to apply only to certain High Courts.

631. This chapter applies only to High Courts which are or may hereafter be established under the twenty-fourth and twenty-fifth of Victoria, chapter 104 (*An Act for establishing High Courts of judicature in India.*)

Aplication of Code to High Courts.

632. Except as provided in this chapter the provisions of this code apply to such High Courts.

633 The High Court shall take evidence, and record judgments and orders in such manner as it by rule from time to time directs.

High Court to record judgments according to its own rules.

634. Whenever a High Court considers it necessary that a decree made in the exercise of its ordinary original civil jurisdiction should be enforced before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

Power to order execution of decree before ascertainment of costs, and

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

execution for costs subsequently.

635. Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its ordinary original civil jurisdiction, or to examine witnesses, except when the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

Unauthorized person not to address Court.

636. Notices to produce documents, summonses to witnesses, and every other judical process, issued in the exercise of the ordinary or extraordinary original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants issued under section 64, writs of execution, and notices under section 553, may be served by the attorneys in the suit, or by persons employed by them, or by such other persons as the High Court by any rule or order, from time, to time directs.

Who may serve proces of High Courts.

637. Any non-judicial or quasi judicial act which this Code requires to be done by a Judge, and any act which may be done by a Commissioner appointed to examine and adjust accounts under section 394, may be done by the Registrar of the Court, or by such other officer of the Court as the Court may direct to do such act.

Non-judicial acts may be done by Registrar.

The High Court may, from time to time, by rule declare what shall be deemed to be non-judicial and quasi-judicial acts within the meaning of this section.

638. The following portions of this Code shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely, sections 16, 17 and 19, sections 54, clauses (*a*) and (*b*), 57, 119, 160, 182 to 185 (both inclusive), 187, 189, 190, 191 192 (so far as relates to the manner of taking evidence,) 198 to 206 (both inclusive), and so much of section 409 as relates to the making of a memorandum;

Sections not applying to High Court in original civil jurisdiction.

and section 579 shall not apply to the High Court in the exercise of its appellate jurisdiction.

Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an insolvent Court.

Code not to affect High Court in exercise of insolvent jurisdiction.

639. The High Court may, from time to time, frame forms for any proceeding in such Court, and may make rules as to the books, entries and accounts to be kept by its officers.

Power to frame forms.

PART X.

CHAPTER XLIX.

MISCELLANEOUS.

640. Women, who according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court.

Exemption of certain women from personal appearance.

But nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process.

This section applies to H. C. and M. S. C. C.

An unmarried girl of 12 years of age, is a woman—*Mainath Sing* vs. *Mussamut Mootra Kooer*, 24 W. R., 375. The privilege is limited to the class of persons described in this section—women who according to the custom and manners of the country ought not to be compelled to appear in public. It cannot be claimed by all women of rank—*Davis* vs. *Middleton*, 8 W. R., 282; but out of respect to the customs of this country the invariable practice has been to allow respectable females, who are not accustomed to appear generally before the public, to be examined in their palkis—*Kistomohun Mookerjee* vs. *S. M. Adarmoney Dabee*, 2 Hyde, 88; 1 Ben., S. N. V. See also *Zohurutoollah Chowdhry* vs. *Asaloodeen Chowdhry*, 15 W. R., 129.

There is no appeal from an order refusiug to summon a person under this section—*Bibee Solendra* vs. *Roy Kaliha Sahoy*, W. R., 1864, Mis., 23.

641. The Local Government may, by notification in the official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption, and may, by like notification, withdraw such privilege.

Local Government may exempt certain persons from personal appearance.

The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government, and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

List of names of persons exempted to be kept in subordinate Court.

When any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

Costs of commission rendered necessary by claiming privilege.

This section applies to H. C. and M. S. C. C.

The exemption is absolute, and not limited to cases in which the party claiming it has been summoned by the opposite party. A Rajah instituted a suit under Act X of 1859, through an agent appointed in that behalf. The Deputy Collector not being satisfied with the information which the agent could give, adjourned the hearing to a subsequent day, and required the personal appearance of the Rajah. The Rajah claimed to be exempted; but the Deputy Collector refused the application and dismissed the case. It was held that the Rajah was not bound to attend, and the suit was wrongly dismissed—*Maharajah Jaggut Inder Bunware Gobind Deo Bahadoor* vs. *Soarjcoomar Chowdhree*, Marsh., 627.

642. No Judge, Magistrate or other judicial officer shall be liable to arrest under this Code, while going to, presiding in, or returning from, his Court.

Person exempt from arrest.

And, except as provided in sections 256 and 643, where any matter is pending before a tribunal having jurisdiction therein, or relieving in good faith that it has such jurisdiction the parties thereto, their pleaders, mukhtars, revenue-agents, and recognized agents and their witnesses acting in obedience to a summons, shall be exempt from arrest under Civil process while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

This section applies to H. C. and M. S. C. C.

Compare *The Empress of India* vs. *Harath Nath Sing*, I. L. R., 4 All., 27, with the present law. See also 2 Taylor, 1155; 2 Taylor and Bell, 234.

The privilege granted to witnesses is not for the personal benefit of the individual but for the furthering of the public interests and the better administration of justice. And if there is not a *bonâ fide* belief that his attendance was required he has no privilege—*Wooma Churn Dhole* vs. *Teil*, 14 Ben., Ap., 13.

In the case of *John* vs. *Carter*, 4 Ben. O., 91, the defendant, Carter, while proceeding to Court to hear his case was arrested under a contempt issued against him in the suit, and it was decided that he had no privilege.

But in a suit under chapter XXXIX where the defendant is not allowed to defend without obtaining lease, a defendant appearing in Court for that purpose is privileged—In the matter of *Soorendro Nath Roy*, I. L. R., 5 Cal., 106; and where plaintiff a resident of Bengal went to Madras on the 24th of October to attend a case which was adjourned for seven weeks on the 27th of October, and he was arrested on the 10 of November. *Held*, he was privileged—In the metter of *Siva Bux*, I. L. R., 4 Mad., 317.

The Small Cause Court of Calcutta is a Court of inferior jurisdiction. Where a prisoner was brought up to the High Court on a writ of *habeas corpus*, and the return of the jailor stated that the prisoner was detained under a warrant of the Small Cause Court, it was held that the prisoner was entitled to go behind the return and show that he was exempted from arrest at the time he was taken into custody—In the matter of *Omrito Lall Dey*, 1 Ind., Cal., 78; in the matter of *Juggessur Roy*, 5 C. L. R., 170.

Procedure in case of certain offences.

643. When in a case pending before any Court, there appears to the Court sufficient ground for sending for investigation to the Magistrate a charge of any such offence as is described in section 193, section 196, section 199, section 200, section 205, section 206, section 207, section 208, section 209, section 210, section 463, section 471, section 474, section 475, section 476 or section 477 of the Indian Penal Code, which may be made in the course of any other suit or proceeding, or with respect to any document offered in evidence in the case, the Court may cause the person accused to be detained till the rising of the Court, and may then send him in custody to the Magistrate, or take sufficient bail for his appearance before the Magistrate.

The Court shall send to the Magistrate the evidence and documents relevant to the charge, and may bind over any person to appear and give evidence before such Magistrate.

The Magistrate shall receive such charge and proceed with it according to law.

This section applies to H. C. and M. S. C. C.

Apparently the case must be pending,—if it has been decided no action can be taken under this section,—and even then the Courts should only refer when they have come to some conclusion in respect of the guilt of the parties or the genuineness of the document, as the case may be – *Hurronath Roy*, petitioner, 7 W. R., 482.

There is no appeal from an order passed under this section.

Use of forms in fourth schedule.

644. Subject to the power conferred on the High Court by section 639 and by the twenty-fourth and twenty-fifth of Victoria, chapter 104, section 15, the forms set forth in the fourth schedule hereto annexed, with such variation as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

This section applies to H. C. and M. S. C. C.

645. The language which, when this Code comes into force, is the language of any Court subordinate to a High Court, shall continue to be the language of such subordinate Court until the Local Government otherwise orders;

Language of subordinate Courts.

but it shall be lawful for the Local Government, from time to time, to declare what language shall be the language of every such Court.

This section spplies to H. C. and M. S. C. C.

645A. In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may if it thinks fit, and upon request of either party to such cause shall, summon to its assistance, in such manner as the Court may by rule, from time to time, direct, two competent assessors; and such assessors shall attend and assist accordingly.

Assessors in causes of salvage, &c.

Every such assessor shall receive such fees for his attendance as the Court by rule prescribes. Such fees shall be paid by such of the parties as the Court in each case may direct.

646. Whenever the Registrar of a Court of Smal Causes has any doubt upon any question of law or usage having the force of law, or as to the construction of a document, which construction may affect the merits of the decision, he may state a case for the opinion of the Judge; and all the provisions herein contained relative to the stating of a case by the Judge shall apply, *mutatis mutandis*, to the stating of a case by the Registrar

Power of Registrars of Small Cause Courts to state cases.

This section applies to H. C. and M. S. C. C.

647. The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals.

Miscellaneous proceedings.

The High Court may, from time to time, make rules to provide for the admission, in such proceedings, of affidavits as evidence of the matters to which such affidavits respectively relate; and such rules, on being published in the local official Gazette, shall have the force of law.

Admission of affidavits as evidence.

This section applies to H. C. and M. S. C. C.

The section does not mean that the proceedings and powers of the Courts in suits before decree are applicable to suits after decree; but to provide a procedure, as near as possible resembling that of the Act. in proceedings other than suits - *Jodoo Monee Dossee*, Petitioner, 11 W. R., 494. So proceedings after final judgment in execution should be governed as far as possible by the procedure before judgment—*Tara Chand Ghose* vs. *Anund Chunder Chowdhry*, 10 W. R., 450; so also in a probate case the evidence should be recorded as in a regular suits—*Saroda Soonduree Dossee* vs. *Mudden Mohun Shaha Bhajun*, 24 W. R., 162.

This section does not give an appeal in proceedings under Reg. I of 1798—*Hureenath Koondoo* vs. *Mudoo Soodun Saha*, 19 W R, 122; but it enables a Court to compel the attendance of a party as a witness, in the manner laid down in the Code in miscellaneous proceedings—*Syud Dehan Hossein* vs. *Mussamut Khodeja*, 8 W. R., 64.

Procedure when person to be arrested or property to be attached is outside district.

648. Where any Court desires that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or property is situate outside the local limits of its jurisdiction, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment;

and the Court making any arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he furnishes sufficient security for his appearance before that Court, or (where the case is one under Chapter XXXIV) for satisfying any decree that may be passed against him by such Court, in either of which cases the Court making the arrest shall release him.

This section applies to H. C., and, so far as relates to arrests, to M. S. C. C.

Rules applicable to all civil process for arrest, sale or payment.

649. The rules contained in chapter XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a civil Court in any civil proceeding.

In the same chapter, the expression "Court which passed a decree," or words to that effect, shall, unless there is something repugnant in the context, be deemed to include, where

the decree to be executed is passed in appeal, the Court which passed the decree against which the appeal was preferred, and where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making application for execution of the decree, would have jurisdiction to try such suit.

This section applies to H. C. and M. S. C. C.

"Ceased to exist or to have jurisdiction to execute it."—See *Hurro Proshad Roy Chowdhry* vs. *Bhupendro Narain Dutt*, 7 C. L. R., 79, I. L. R., 6 Cal., 201.

Where a mortgage decree was passed and before any application for execution was made, the property was transferred to another munsifee: *Held* application could be made to either Court—*Luchmun* vs. *Muddun*, 7 C. L. R., 521, I. L. R., 6 Cal., 513.

Application of rules as to witnesses.

650. The provisions of chapters XIV and XV relating to witnesses shall apply to all persons required to give evidence or to produce documents in any proceeding under this Code.

Service of foreign summonses.

650A. Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts: Provided that the Courts issuing such summonses have been established by the authority of the Governor-General in Council, or that the Governor-General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts.

The Governor-General in Council may, by like notification, cancel any notification made under this section, but not so as to invalidate the service of any summons served previous to such cancellation.

This section applies to H. C. and M. S. C. C.

Penalty for resisting apprehension or escaping from custody under Code or civil process.

651. Whoever offers any resistance or illegal obstruction to the lawful apprehension of himself under this Code, or under the warrant of any or Civil Revenue Court, or escapes or attempts to escape from any custody in which he is lawfully detained under this Code or under such warrant, shall, on conviction before a Magistrate, be punished with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

This section applies to H. C. and M. S. C. C.

See the *Empress of India* vs. *Harakh Nath Singh*, I. L. R., 4 Alla., 27.

Power to make subsidiary rules of procedure.

652. The High Court may, from time to time, make rules consistent with this Code to regulate any matter connected with its own procedure or the procedure of the Courts of Civil Judicature subject to its superintendence. All such rules shall be published in the local official Gazette, and shall thereupon have the orce of law.

This section applies to H. C. and M. S. C. C,

THE FIRST SCHEDULE.

(See section 3.)

ACTS REPEALED.

Number and year.	Subject or title.	Extent of repeal.
X of 1877 ...	The Code of Civil Procedure.	So much as has not been repealed.
XII of 1879 ...	Amending Act X of 1877, &c.	Sections one to one hundred and three (both inclusive).
VII of 1880 ...	Merchant Shipping ...	Section eighty-five.

THE SECOND SCHEDULE.

(See section 5.)

Chapters and Sections of this Code extending to Provincial Courts of Small Causes.

PRELIMINARY: Sections 1, 2, 3 and 5.

CHAPTER I.—Of the Jurisdiction of the Courts and *Res Judicata*, except section 11.

CHAPTER II.—Of the Place of Suing, except section 20, paragraph 4, and sections 22 to 24 (both inclusive).

CHAPTER III.—Of Parties and their Appearances, Applications and Acts.

CHAPTER IV.—Of the Frame of the Suit except section 42 and section 44, rule *a*.

CHAPTER V.—Of the Institution of Suits.

CHAPTER VI.—Of the Issue and Service of Summons, except section 77.

CHAPTER VII.—Of the Appearance of the Parties and Consequence of Non-appearance.

CHAPTER VIII.—Section 111, Set-off.

CHAPTER IX.—Of the Examination of the Parties by the Court, except section 119.

CHAPTER X.—Of Discovery and the Admission, &c., of Documents

CHAPTER XII.—Section 155, first paragraph, Judgment where eithe party fails to produce his evidence.

THE SECOND SCHEDULE—(*concluded.*)

Chapters and Sections of this Code extending to Provincial Courts of Small Causes—(concluded.)

CHAPTER XIII.—Of Adjournments.
CHAPTER XIV.—Of the Summoning and Attendance of Witnesses.
CHAPTER XV.—Of the Hearing of the Suit and Examination of Witnesses, except sections 182 to 188 (both inclusive).
CHAPTER XVII.—Of Judgment and Decree, except sections 204 207, 211, 212, 213, 214 and 215.
CHAPTER XVIII.—Sections 220, 221 and 222, of Costs.
CHAPTER XIX.—Of the Execution of Decrees, sections 223 to 236 (both inclusive), 239 to 258 (both inclusive), 259 (except so far as relates to the recovery of wives), 266 (except so far as relates to immoveable property), 267 to 272 (both inclusive), 273 (so far as relates to decrees for moveable property), 275 to 280 (both inclusive), 283, 284 (so far as relates to moveable property), 285, 286, 287, 288, 289, 290, 291, 292, 293 (so far as relates to resales under 297), 294 to 303 (both inclusive), 328 to 333 (both inclusive, so far as relates to moveable property) 336 to 343 (both inclusive).
CHAPTER XX.—Section 360, Power to invest certain Courts with Insolvency-jurisdiction.
CHAPTER XXI.—Of the Death, Marriage and Insolvency of Parties.
CHAPTER XXII.—Of the Withdrawal and Adjustment of Suits.
CHAPTER XXIII.—Of payment into Court.
CHAPTER XXIV.—Of requiring Security for Costs.
CHAPTER XXV.—Of Commissions.
CHAPTER XXVI.—Suits by Paupers.
CHAPTER XXVII.—Suits by and against Government or Government Servants.
CHAPTER XXVIII.—Suits by Aliens and by and against Foreign and Native Rulers, except the first paragraph of section 433.
CHAPTER XXIX.—Suits by and against Corporations and Companies.
CHAPTER XXX.—Suits by and against Trustees, Executors and Administrators.
CHAPTER XXXI.—Suits by and against Minors and Persons of unsound mind.
CHAPTER XXXII.—Suits by and against Military Men.
CHAPTER XXXIII.—Interpleader.
CHAPTER XXXIV.—Of Arrest and Attachment before Judgment, except as regards immoveable property.
CHAPTER XXXVI.—Appointment of Receivers.
CHAPTER XXXVII.—Reference to Arbitration, sections 506 to 526 (both inclusive).
CHAPTER XXXVIII.—Of Proceedings on Agreement of Parties.
CHAPTER XLVI.—Reference to and Revision by High Court.
CHAPTER XLVII.—Of Review of Judgment.
CHAPTER XLIX.—Miscellaneous, sections 640 to 647 (both inclusive) sections 649 to 652 (both inclusive).

THE THIRD SCHEDULE.

(See section 7.)

Bombay Enactments.

Bombay Regulation XXIX, 1827.
" " VII, 1830.
" " I, 1831.
" " XVI, 1831.
Act XIX of 1835.
" XIII of 1842.

THE FOURTH SCHEDULE.

(See section 644.)

FORMS OF PLEADINGS AND DECREES.

A.—PLAINTS.—PART I.

No. 1.

FOR MONEY LENT.

IN THE COURT OF , AT

Civil Suit No.

A. B. of

against

C. D. of

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at he lent the defendant rupees repayable on demand [*or* on the day of]

2. That the defendant has not paid the same, except rupees paid on the day of 18 .

[*If the plaintiff claims exemption from any law of limitation, say* :—

3. The plaintiff was a minor [*or* insane] from the day of till the day of].

4. The plaintiff prays judgment for rupees, with interest at per cent. from the day of 18 .

[NOTE.—The object of stating when the debt is to be repaid is merely to fix a date for interest It, therefore, interest is not claimed, the statement may be omitted.]

THE FOURTH SCHEDULE—*(continued.)*

No. 2.

For Money received to Plaintiff's Use.

(Title.)

A B, and *G. H.*, the above-named plaintiffs, state as follows :—

1. That on the day of 18 , at , the defendant received rupees [*or* a cheque on the Bank for rupees]: from one *E. F.* for the use of the plaintiffs.

2. That the defendant has not paid [*or* delivered] the same accordingly.

3. The plaintiffs pray judgment for rupees, with interest at per cent. from the day of 18 .

No. 3.

For Price of Goods sold by a Factor.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , he and *E. F.*, since deceased, delivered to the defendant [*one thousand barrels of flour, five hundred maunds of rice, or as the case may be*] for sale upon commission.

2. That on the day of 18 , at , [*or* on some day unknown to the plaintiff, before the day of 18], the defendant sold the said merchandise for rupees.

3. That the commission and expenses of the defendant thereon amount to rupees.

4. That on the day of 18 , the plaintiff demanded from the defendant the proceeds of the said merchandise.

5. That he has not paid the same.

[*Demand of judgment.*]

No. 4.

For Money received by Defendant through the Plaintiff's Mistake of Fact.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.

THE FOURTH SCHEDULE—(*continued.*)

2. That the plaintiff procured the said bars, to be assayed by one *E. F.*, who was paid by the defendant for such assay, and that the said *E. F.*, declared each of the said bars to contain 1,500 tolas of fine silver, and that the plaintiff accordingly paid the defendant rupees annas therefor.

3. That each of the said bars did contain only 1,200 tolas of fine silver.

4. That the defendant has not repaid the sum so overpaid.

[*Demand of judgment.*]

[NOTE.—A demand of repayment is not necessary, but it may affect the question of interest or the costs.

No. 5.

FOR MONEY PAID TO A THIRD PARTY AT THE DEFENDANT'S REQUEST.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , at the request [*or* by the authority] of the defendant, the plaintiff paid to one *E. F.* rupees.

2. That, in consideration thereof, the defendant promised [*or* became bound] to pay the same to the plaintiff on demand [*or as the case may be*].

3. That on the day of 18 , the plaintiff demanded payment of the same from the defendant, but] he has not paid the same.

[*Demand of judgment.*]

[NOTE.—If the request or authority is implied, the plaint should state facts raising the implication.]

No. 6.

FOR GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , *E. F.*, of , deceased, sold and delivered to the defendant [one hundred barrels of flour, *or*, the goods mentioned in the schedule hereto annexed, *or*, sundry goods].

THE FOURTH SCHEDULE—(*continued.*)

2. That the defendant promised to pay rupees for the said goods on delivery [*or*, on the day of *some day before the plaint was filed*].

3. That he has not paid the same.

4. That the said *E. F*, in his lifetime made his will, whereby he appointed the plaintiff executor thereof.

5. That on the day of 18 , the said *E. F.* died.

6. That on the day of probate of the said will was granted to the plaintiff by the Court of

7. The plaintiff as executor as aforesaid.

[*Demand of judgment.*]

NOTE.—If a day was fixed for payment it should be stated as furnishing a date for the commencement of interest.

No 7.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , plaintiff sold and delivered to the defendant [sundry articles of house-furniture] but no express agreement was made as to the price.

2. That the same were reasonably worth rupees.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

[NOTE.—The law implies a promise to pay so much as the goods are reasonably worth.]

No. 8.

FOR GOODS DELIVERED TO A THIRD PARTY AT DEFENDANT'S REQUEST AT A FIXED PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , plaintiff sold to the defendant [one hundred barrels of flour] and, at the request of the defendant, delivered the same to one *E. F.*

THE FOURTH SCHEDULE—(*continued.*)

2. That the defendant promised to pay to the plaintiff rupees therefor.
3. That he has not paid the same.

[*Demand of judgment.*]

No. 9

FOR NECESSARIES FURNISHED TO THE FAMILY OF DEFENDANT'S TESTATOR WITHOUT HIS EXPRESS REQUEST, AT A REASONABLE PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff furnished to [*Mary Jones*] the wife of [*James Jones*] deceased, at her request, sundry articles of [*food and clothing*], but no express agreement was made as to the price.
2. That the same were necessary for her.
3. That the same were reasonably worth rupees.
4. That the said *James Jones* refused to pay the same.
5. That the defendant is the executor of the last Will of the said *James Jones*.

[*Demand of judgment.*]

No. 10.

FOR GOODS SOLD AT A FIXED PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day 18 , at , the plaintiff sold to *E F* , of , deceased, [*all the crops then growing on his farm in*].
2. That the said *E. F.* promised to pay the plaintiff rupees for the same.
3. That he did not pay the same.
4. That the defendant is administrator of the estate of the said *E. F.*

[*Demand of judgment.*]

No. 11.

FOR GOODS SOLD AT A REASONABLE PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , *E. F.*, of sold to the defendant [*all the fruit growing in his orchard in*], but no express agreement was made as to the price.

THE FOURTH SCHEDULE—(*continued.*)

2. That the same was reasonably worth rupees.

3. That the defendant has not paid the same.

4. That on the day of the High Court of Judicature at Fort William duly adjudged the said *E. F.* to be a lunatic and appointed the plaintiff committee of his estate, with the usual powers for the management thereof.

5. The plaintiff as committee as aforesaid.

[*Demand of judgment.*]

[NOTE.—When the lunatic's estate is not subject to the ordinary original jurisdiction of a High Court, for paragraphs 4 and 5 substitute the following :—]

4. That on the day of the Civil Court of auly adjudged the said *E. F.* to be of unsound mind and incapable of managing his affairs, dnd appointed the plaintiff Manager of his estate.

5. The plaintiff as Manager as aforesaid,

[*Demand of judgment.*]

No. 12.

FOR GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , *E. F.*, of agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that the said *E. F.* should pay for the same upon delivery thereof rupees.

2. That the plaintiff made the said goods, and on the day of 18 , offered to deliver the same to the said *E. F.*, and has ever since been ready and willing so to do.

3. That the said *E. F.* has not accepted the said goods or paid for the same.

4. That on the day of 18 , the High Court of Judicature at Fort William duly adjudged the said *E. F.* to be a lunatic, and appointed the defendant committee of his estate.

5. The plaintiff prays judgment for rupees with interest from the day of , at the rate of per cent. per annum, to be paid out of the estate of the said *E. F.* in the hands of the defendant.

No, 13.

FOR DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION.

(*Title,*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at plaintiff put up at auction sundry [*articles of merchandise*], subject to the condition that all goods not paid for and removed by the purchaser thereof within [*ten days*] after the sale, should be re-sold by auction on his account, of which condition the defendant had notice.

THE FOURTH SCHEDULE—(*continued.*)

2. That the defendant purchased [*one crate of crockery*] at the said auction at the price of rupees.

3. That the plaintiff was ready and willing to deliver the same to the defendant on the said day and for [*ten days*] thereafter, of which the defendant had notice.

4. That the defendant did not take away the said goods purchased by him, nor pay therefor, within [*ten days*] after the sale, nor afterwards.

5. That on the day of 18 , at , the plaintiff re-sold the said [*crate of crockery*], on account of the defendant by public auction, for rupees.

6. That the expenses attendant upon such re-sale amounted to rupees.

7. That the defendant has not paid the deficiency thus arising, amounting to rupees.

[*Demand of judgment.*]

[NOTE to § 4 —Unless the seller agreed to deliver, the purchaser must fetch the goods ; see Act IX of 1872, section 93.

No, 14.

FOR THE PURCHASE-MONEY OF LANDS CONVEYED.

(*Title.*)

A. B. the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff sold [and conveyed] to the defendant [the house and compound No. , in the city of or, a farm known as , in or, a piece of land lying, *&c.*]

2. That the defendant promised to pay the plaintiff rupees for the said [house and compound, or farm *or* land.]

3. That he has not paid the same.

[*Demand of judgment.*]

[NOTE.—Where there has been no actual conveyance, say, § 1. "sold to the defendant the house, &c., and placed him in possession of the same."]

No. 15.

FOR THE PURCHASE-MONEY OF IMMOVEABLE PROPERTY CONTRACTED TO BE SOLD, BUT NOT CONVEYED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [the house No. , in the town of *or* one hundred bighas of land in , boundde by the East Indian railroad, and by other lands of the plaintiff] for rupees.

THE FOURTH SCHEDULE—(*continued.*)

2. That on the day of 18 , at , the plaintiff tendered [*or*, was ready and willing, and offered to execute] a sufficient instrument of conveyance of the said property to the defendant, or payment of the said sum, and still is ready and willing to execute the same.

3. That the defendant has not paid the said sum.

[*Demand of judgment.*]

No. 16.

For Services at a fixed Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant [hired plaintiff as a clerk, at the salary of rupees per year].

2. That from the [said day] until the day of 18 , the plaintiff served the defendant as his [clerk].

3. That the defendant has not paid the said salary.

[*Demand of judgment.*]

No. 17.

For Services at a Reasonable Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That between the day of 18 , and the day of 18 , at , plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2. That the said services were reasonably worth rupees.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 18.

For Services and Materials at a fixed Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff [furnished the paper for and printed one thousand copies of a book called] for the defendant, at his request [and delivered the same to him].

THE FOURTH SCHEDULE—(*continued.*)

2. That the defendant promised to pay rupees therefor.
3. That he has not paid the same.

[*Demand of judgment.*]

No. 19.

FOR SERVICES AND MATERIALS AT A REASONABLE PRICE.

(*Title*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the price to be paid for such work and materials.
2. That the said work and materials were reasonably worth rupees.
3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 20.

FOR RENT RESERVED IN A LEASE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the defendant entered into a contract with the plaintiff, under their hands, a copy of which is hereto annexed.

(*Or state the substance of the contract.*)

2. That the defendant has not paid the rent of the [month] ending on the day of 18 , amounting to rupees.

[*Demand of judgment.*]

Another Form.

1. That the plaintiff let to the defendant a house, No. 27, Chowringhee, for seven years to hold from the day of 18 , at rupees a year, payable quarterly.
2. That of such rent quarters are due and unpaid.

[*Demand of judgment.*]

THE FOURTH SCHEDULE.—(*continued.*)

No. 21.

FOR USE AND OCCUPATION AT A FIXED RENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant hired from the plaintiff [the house No. street], at the rent of rupees, payable on the first day of

2. That the defendant occupied the said premises from the day of 18 , to the day of 18 .

3. That the defendant has not paid rupees, being the part of said rent due on the first day of 18

[*Demand of judgment.*]

No. 22.

FOR USE AND OCCUPATION AT A REASONABLE RENT.

(*Title.*)

A. B., the above-named plaintiff, executor of the will of *X. Y.*, deceased, states as follows :—

1. That the defendant occupied the [house No. , street], by permission of the said *X. Y.*, from the day of 18 , until the day of 18 , and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.

3. That the defendant has not paid the same.

4. The plaintiff as such executor as aforesaid prays judgment for rupees.

No. 23.

FOR BOARD AND LODGING.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That from the day of 18 , until the day of 18 , the defendant occupied certain rooms in the house [No. , street], by permission of the plaintiff, and was furnished by the plaintiff, at his request, whit meat, drink, attendance and other necessaries.

THE FOURTH SCHEDULE.—(*continued*)

2. That in consideration thereof, the defendant promised to pay [*or* That no agreemen was made as to payment for such meat, drink, attendance or necessaries, but the same were reasonably worth] the sum of . rupees.

hat the defendant has not paid the same.

[*Demand of judgment.*]

No. 24.

For Freight of Goods.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 ,at ,plaintiff transported in [his barge, *or otherwise*] [one thousand barrels of flour, *or* sundry goods], from to , at the request of the defendant.

2. That the defendant promised to pay the plaintiff the sum of [one rupee per barrel] as freight thereon [*or*, That no agreement was made as to payment for such transportation, but such transportation was reasonably worth rupees.]

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 25.

For Passage-money.

(*Title.*)

A B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , plaintiff conveyed the defendant [in his ship, called the] from to], from to at his request.

2 That the defendant promised to pay the plaintiff rupees therefor, [*or* That no agreement was made as to the price of the said passage, was reasonably worth rupees].

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No 26.

On an Award.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant, having a controversy between them concerning [a demand of the plaintiff for the price of ten barrels of oil, which the defendant refused to pay], agreed to

THE FOURTH SCHEDULE.—(*continued.*)

submit the same to the award of *E. F.* and *G. H.*, as arbitrators [*or*, entered into an agreement, a copy of which is hereto annexed].

2 That on the day of 18 , at , the said arbitrators awarded that , the defendant should] pay the plaintiff rupees].

3. That the defendant has not paid the same.

[*Demand of judgment.*]

[NOTE.—This will apply where the agreement to refer is not filled in court]

No. 27.

ON A FOREIGN JUDGMENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at in the State [*or* Kingdom] of , the Court of that State [*or* Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees, with interest from the said date.

2. That the defendant has not paid the same.

[*Demand of judgment.*]

PLAINTS UPON INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.

No. 28.

ON AN ANNUTY BOND.

(*Title.*)

A. B., the above-named plaintiff, states as follow :—

1. That on the day of 18 , at , the defendant by his bond became bound to the plaintiff in the sum of rupees to be paid by the defendant to the plaintiff, subject to a condition that if the defendant should pay to the plaintiff rupees half-yearly on the day of and the day of in every year during the life of the plaintiff, the said bond should be void.

2. That afterwards, on the day of 18 , the sum of rupees for of the said half-yearly payments of the said annuity, became due to the plaintiff and is still unpaid.

[*Demand of judgment.*]

No. 29.

PAYEE AGAINST MAKER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, by his promissory note now overdue, promised to pay to the plaintiff rupees [days] after date.

THE FOURTH SCHEDULE.—(*continued.*)

2. That he has not paid the same [except rupees, paid on the day of 18].

[*Demand of judgment.*]

[NOTE.—*Where the note is payable after notice, for paragraps* 1 *and* 2 *substitute* :—]

1. That on the day of 18 , at , the defendant by his promissory note promised to pay to the plaintiff rupees months after notice.

2. That notice was afterwards given by the plaintiff to the defendant to pay the same months after the said notice.

3. That the said time for payment has elapsed, but the defendant has not paid the same.

[*Where the note is payable at a particular place, say*—]

1. That on the day of 18 , at , the defendant by his promissory note, won overdue, promised to pay to the plaintiff [at Messrs. *A & Co.'s*, Madras] rupees months after date.

2. That the said note was duly presented for payment [at Messrs. *A. & Co.'s*] aforesaid, but has not been paid.

Written Statement of the Defendant.

IN THE COURT, &C.

D. C., the above-named defendant, states as follows :—

1. The defendant made the note sued upon under the following circumstances: The plaintiff and defendant had for some years been in partnership as indigo-manufacturers, and it had been agreed between them that they should dessolve partnership, that the plaintiff should retire from the business, and that the defendant should take over the whole of the partnership-assets and liabilities and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership-books and inquire into the state of the partnership-assets and liabilities; and he did not accordingly examine the said books and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded Rs. 1,00,000 and that the liabilities of the firm were less than Rs. 30,000, whereas the fact was that the assets of the firm were less than Rs. 50,000 and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the second paragraph of this statement induced the defendant to make the note now sued, or, and there never was any other consideration for the making of such note.

No. 30.

FIRST INDORSEE AGAINST MAKER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, by his promissory note, now overdue, promised to pay to the order of *E. F.* [*or* to *E. F.* or order] rupees [days after date].

2. That the said *E. F.* indorsed the same t o the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment*].

THE FOURTH SCHEDULE—(*continued.*)

No. 31.

SUBSEQUENT INDORSEE AGAINST MAKER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. [*As in the last preceding form.*]

2. That the same was, by the indorsement of the said *E. F.* and of *G. H.* and *I. J.* [*or* and others] transferred to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 32.

FIRST INDORSEE AGAINST FIRST INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That *E. F.*, on the day of 18 , at , by his promissory note, now overdue, promised to pay to the defendant or order rupees months after date.

2. That the defendant indorsed the same to the plaintiff.

3. That on the day of 18 , the same was duly presented for payment, but was not paid.

[*Or state facts excusing want of presentment.*]

4. That the defendant had notice thereof.

5. That he has not paid the same.

[*Demand of judgment.*]

No. 33.

SUBSEQUENT INDORSEE AGAINST FIRST INDORSER; THE INDORSEMENT BEING SPECIAL.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to one *E. F.* a promissory note, now overdue, made [*or* purporting to have been made] by one *G. H.*, on the day of 18, at , to the order of the defendant, for the sum of rupees [payable days after date].

THE FOURTH SCHEDULE—(*continued.*)

2. That the same was, by the endorsement of the said *E. F.* [and others], transferred to the plaintiff. [*or* That the said *E. F.* indorsed the same to the plaintiff.]

3, 4 and 5, [*Same as* 3, 4 *and* 5 *of the last preceding form.*]

[*Demand of judgment.*]

No. 34.

SUBSEQUENT INDORSEE AGAINST HIS IMMEDIATE INDORSER.

[*Title.*]

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to him a promissory note, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 at , to the order of one *G. H.*, for the sum of rupees [payable days after date], and indorsed by the said *G. H.* to the defendant.

2, 3 and 4. [*Same as in* 3, 4 *and* 5 *in Form No.* 33.

[*Demand of judgment.*]

No. 35.

SUBSEQUENT INDORSEE AGAINST INTERMEDIATE INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That a promissory note, now overdue, made [*or* purporting to have been made] by one *E. F.* on the day of 18 , at , to the order of one *G. H.*, for the sum of rupees [payable days after date,] and indorsed by the said *G. H.* to the defendant, was by the indorsement of the defendant [and other] transferred to the plaintiff.

2, 3 and 4. (*As in No.* 33.)

[*Demand of judgment.*]

No. 36.

SUBSEQUENT INDORSEE AGAINST MAKER AND FIRST AND SECOND INDORSER.

IN THE COURT OF AT

Civil Suit No.

A. B. of

against

C. D. of

E. F. of

and

G. H. of

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, *C. D.*, by his promissory note, now overdue, promised to pay the order of the defendant, *E. F.*, rupees] months after date].

THE FOURTH SCHEDULE—(*continued.*)

2. That the said *E. F.* indorsed the same to the defendant, *G. H.*, who indorsed it to the plaintiff.

3. That on the day of 18 , the same was presented [*or state facts excusing want of presentment*] to the said *C. D.* for payment, but was not paid.

4. That the said *E. F.* and *G. H.* had notice thereof.

5. That they have not paid the same.

[*Demand of judgment.*]

No. 37.

DRAWER AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , by his bill of exchange, now overdue, the plaintiff required the defendant to pay to him rupees [days after date, *or* sight, thereof].

2. That the defendant accepted the said bill. [*If the bill is payable at a certain time after sight, the date of acceptance should be stated; otherwise it is not necessary.*]

3. That he has not paid the same.

That by reason thereof the plaintiff incurred expenses in and about the presenting and noting of the bill, and incidental to the dishonour thereof.

[*Demand of judgment.*]

(NOTE.—Where the bill is payable to a third party, for paragraphs 1, 2, 3, say——)

1. That on, &c., at &c., by his bill of exchange, now overdue, directed to the defendant, the plaintiff required the defendant to pay to *E. F.* or order rupees months after date.

2. That the plaintiff delivered the said bill to the said *E. F.* on

3. That the defendant accepted the said bill, but did not pay the same, whereupon the same was returned to the plaintiff.

No. 38.

PAYEE AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , the defendant accepted a bill of exchange, now overdue, made (*or* purporting to have been made) by one *F. E.*, on the day of 18 , at , requiring the defendant to pay the plaintiff rupees after sight thereof.

THE FOURTH SCHEDULE—(*continued.*)

2. That he has not paid the same.

[*Demand of judgment.*]

No. 39.

FIRST INDORSEE AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendant accepted a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring the defendant to pay to the order of one *G. H.* rupees after sight thereof.

2. That the said *G. H.* indorsed the same to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 40.

SUBSEQUENT INDORSEE AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. [*As in the last preceding form, to the end of article* 1.]

2. That by the indorsement of the said *G. H.* [and others], the same was transferred to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 41.

PAYEE AGAINST DRAWER FOR NON-ACCEPTANCE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, by his bill of exchange, directed to *E. F.* required the said *E. F.* to pay to the plaintiff rupees [days after sight.]

2. That on the day of 18 , the same was duly presented to the said *E. F.* for acceptance, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment.*]

THE FOURTH SCHEDULE—(*continued.*)

No. 42.

FIRST INDORSEE AGAINST FIRST INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to the plaintiff a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring one *G. H.* to pay to the order of the defendant rupees [days] after sight [*or* after date, *or* at sight] thereof, [and accepted by the said *G. H.* on the day of 18].

2. That on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment.*]

No. 43.

SUBSEQUENT INDORSEE AGAINST FIRST INDORSER; THE INDORSEMENT BEING SPECIAL.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to one *E. F.*, a bill of exchange, now overdue, made [*or* purporting to have been made] by one *G. H.*, on the day of 18 at , requiring one *I. J.* to pay to the order of the defendant rupees days after sight thereof [*or otherwise*], and accepted by the said *I. J.* on the day of 18 . [*This clause may be omitted if not according to the fact.*]

2. That the same was, by the indorsement of the said *E. F.* [and others] transferred to the plaintiff.

3. That on the day of 18 , the same was presented to the said *I. J.* for payment, and was dishonoured.

4. That the defendant had due notice thereof.

5. That he has not paid the same.

[*Demand of judgment.*]

No. 44.

SUBSEQUENT INDORSEE HIS IMMEDIATE INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to plaintiff a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring one *G. H.* to pay to the order of *I. J.* rupees days after sight therof or [*otherwise*], [accepted by the said *G. H.*] and indorsed by the said *I. J.* to the defendant.

2. That on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.

THE FOURTH SCHEDULE—(*continued.*)

3. That the defendant had due notice thereof.
4. That he has not paid the same.

[*Demand of Judgment.*]

No. 45.

SUBSEQUENT INDORSEE AGAINST HIS IMMEDIATE INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring one *G. H.* to pay to the order of one *I. J.* rupees days after sight thereof [*or otherwise*], [accepted by the said *G. H.*] and indorsed by the said *I. J.* to the defendant, was, by the indorsement of the defendant [and others], transferred to the plaintiff.

2. That on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment.*]

No. 46.

INDORSEE AGAINST DRAWER, ACCEPTOR AND INDORSER.

IN THE COURT OF , AT

Civil Suit No.

A. B. of

against

C. D. of

E. F. of

and

G. H. of

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at the defendant *C. D.*, by his bill of exchange, now overdue, directed to the defendant *E. F.* required the said *E. F.* to pay to the order of the defendant *G. H.* rupee [days after sight thereof.]

2. That on the day of 18 , the said *E. F.* accepted the same.

3. That the said *G. H.* indorsed the same to the plaintiff.

THE FOURTH SCHEDULE—(*continued.*)

4. That on the day of , 18 , the same was presented to the said *E. F.*, for payment, and was dishonoured.

5. That the other defendants had due notice thereof.

6. That they have not paid the same.

[*Demand of judgment.*]

No. 47.

PAYEE AGAINST DRAWER FOR NON-ACCEPTANCE OF A FOREIGN BILL.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant by his bill of exchange, drawn in Calcutta, required one *E. F.* to pay to the plaintiff in [London] pounds sterling, [sixty days] after sight thereof.

2. That on the day of 18 , the same was presented to the said *E. F.* for acceptance, and was dishonoured and was thereupon duly protested.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[5. That the value of pounds sterling, at the time of the service of notice of protest on the defendant, was rupees annas.]

Wherefore the plaintiff demands judgment against the defendant for rupees, with [ten per centum] compensation and interest from the date of 18

No. 48.

PAYEE AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , one *E. F.*, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff rupees after date [*or* days after sight] thereof.

2. That on the day of 18 , the defendant accepted the said bill.

3. That he has not paid the same.

[*Demand of judgment.*]

No. 49.

ON A MARINE [OPEN] POLICY, ON VESSEL LOST BY PERILS OF THE SEA, &C.

(*Title.*)

A. B., the above-named plaintiff, states as follow :—

1. The plaintiff was the owner of [*or* had an interest in] the ship at the time of her loss, as hereinafter mentioned.

THE FOURTH SCHEDULE—(*continued.*)

2. That on the day of 18 , at , the defendants, in consideration of rupees to them paid [*or* which the plaintiff then promised to pay] executed to him a policy of insurance upon the said ship, a copy of which is hereto annexd ; [*or*, whereby they promised to pay to the plaintiff, within days after proof of his loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the said ship, during her next voyage from to , , whether by perils of the sea or by fire, or other causes mentioned, not therein exceeding rupees.]

3. That the said ship, while proceeding on the voyage mentioned in the said policy, was on the day of 18 , totally lost by the perils of the sea [*or otherwise*].

4. That the plaintiff's loss thereby was rupees.

5. That on the day of 18 , he furnished the defendants with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendants have not paid the loss.

[*Demand of judgment.*]

No. 50.

ON CARGO, LOST BY FIRE :—VALUED POLICY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff was the owner of [*or* had an interest in] [one hundred bales of cotton] on board the ship at the time of her loss as hereinafter mentioned.

2. That on the day of 18 , at , the defendants, in consideration of rupees which the plaintiff then paid [*or* promised to pay], executed to him a policy of insurance upon the said goods, a copy of which is hereto annexed ; [*or*, [whereby they promised to pay to the plaintiff rupees in case of the total loss, by fire or other causes mentioned, of the said goods before their landing at ; *or*, in case of partial loss, such damage as the plaintiff might sustain thereby, provided the same should not exceed per centum of the whole value of the goods].

3. That on the day of 18 , at , while proceeding on the voyage mentioned in the sa d policy, the said goods were totally destroyed by fire (*or*, as the case may be).

4, 5 and 6. [*As in paragraphs* 4, 5 *and* 6 *of the last preceding form.*]

[*Demand of judgment.*]

No. 51.

ON FREIGHT :—VALUED POLICY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff had an interest in the freight to be earned by the ship on her voyage from to , at the time of her loss as hereinafter mentioned, and that a large quantity of goods was shipped upon freight in her at that time.

2. That on the day of 18 , at , the defendant, in consideration of rupees to him paid, executed to the plaintiff a policy of insurance upon the said freight, a copy of which is hereto annexed [*or state its tenor, as before*].

THE FOURTH SCHEDULE—(*continued.*)

3. That the said ship, while proceeding upon the voyage mentioned in the said policy, was, on the day of 18 , totally lost by [the perils of the sea].

4. The plaintiff has not received any freight from the said ship, nor did she any on the said voyage, by reason of her loss as aforesaid.

5 and 6. [*As in Form No.* 49.]

[*Demand of judgment.*]

No. 52.

FOR A LOSS BY GENERAL AVERAGE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff was the owner of [*or* had an interest in] [one hundred bales of cotton] shipped on board a vessel called the *Y. Z.*, from to , at the time of the loss hereafter mentioned.

2. That on the day of 18 , at , in consideration of rupees [which the plaintiff then promise to pay], the defendant executed to the plaintiff a policy of insurance upon his said goods, a copy of which is hereto annexed [*or state its tenor, as before.*]

3. That on the day of 18 , while proceeding on the voyage mentioned in the said policy, the said vessel was so endangered by perils of the sea, that the master and crew thereof were compelled to, and did, cast into the sea a large part of her rigging and furniture.

4. That the plaintiff was, by reason thereof, compelled to, and did, pay a general average loss of rupees.

5. That on the day of 18 , he furnished the defendant with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendant has not paid the said loss.

[*Demand of judgment.*]

No. 53.

FOR A PARTICULAR AVERAGE LOSS.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1 and 2. [*As in the last preceding form.*]

3. That on the day of 18 while on the high seas, the sea-water broke into the said ship, and damaged the said [cotton] to the amount of rupees.

4 and 5. [*As in paragraphs* 5 *and* 6 *of the last preceding form.*]

[*Demand of judgment.*]

THE FOURTH SCHEDULE—(*continued.*)

No. 54

ON A FIRE-INSURANCE POLICY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff [was the owner of, *or*] had an interest in a [dwelling-house known as No. , street, in the city of ,] at the time of its destruction [*or*, injury] by fire as hereinafter mentioned.

2. That the day of 18 , at , in consideration of rupees [to them paid], the defendants executed to the plaintiff a policy of insurance on the said [premises], a copy of which a hereto annexed [*or state its tenor*].

3. That on the day of 18 , the said [dwelling-house] was totally destroyed [*or*, greatly damaged] by fire.

4. That the plaintiff's loss thereby was rupees.

5. That on the day of 18 , he furnished the defendant with proof of his said loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendants have not paid the said loss.

[*Demand of judgment.*]

No. 55.

AGAINST SURETY FOR PAYMENT OF RENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , one *E. F.* hired from the plaintiff, for the term of years, the [house No. , street ,] at the annual rent of rupees, payable [monthly].

2. That [at the same time and place] the defendant agreed, in consideration of the letting of the said premises to the said *E. F.*, to guarantee the punctual payment of the said rent.

3. That the rent aforesaid for the month of 18 amounting to rupees, has not been paid.

[*If, by the terms of the agreement, notice is required to be given to the surety, add :*—]

4. That on the day of 18 , the plaintiff gave notice to the defendant of the non-payment of the said rent, and demanded payment thereof.

5. That he has not paid the same.

[*Demand of judgment.*]

B.—PLAINTS FOR COMPENSATION FOR BREACH OF CONTRACT.

No. 56.

FOR BREACH OF AGREEMENT TO CONVEY LAND.

(*Title*)

A. B., the above-named plaintiff, states as follows :—

THE FOURTH SCHEDULE—(*continued.*)

1. That on the day of 18 at , the plaintiff and defendant entered into an agreement, under their hands, of which a copy is hereto annexed.

[*Or*, That on, &c., the defendant agreed with the plaintiff that, in consideration of a deposit of rupees then paid, and of the further sum of [ten thousand] rupees payable as hereinafter mentioned, he would, on the day of 18 at execute to the plaintiff a sufficient conveyance of [the house No. , street, in the city of , free from all incumbrances; and the plaintiff agreed to pay [ten thousand] rupees for the same on delivery thereof.

2. That on the day of 18 , the plaintiff demanded the conveyance of the said property from the defendant and tendered rupees to the defendant [*or*, That all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part.]

3. That the defendant has not executed any conveyance of the said property to the plaintiff [*or*, That there is a mortgage upon the said property made by to for rupees, registered in the office of on the day of 18 and still unsatisfied, *or any other defect of title.*]

4. That the plaintiff has thereby lost the use of the money paid by him as such deposit as aforesaid and of other moneys provided by him for the completion of the said purchase, and has lost the expenses incurred by him in investigating the title of the defendant and in preparing to perform the agreement on his part, and has incurred expense in endeavouring to procure the performance thereof by the defendant.

5. The plaintiff prays judgment for rupees compensation.

No. 57.

FOR BREACH OF AGREEMENT TO PURCHASE LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant entered into an agreement, under their hands, of which a copy is hereto annexed.

[*Or*, That on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees.]

2. That on the day of 18 , at , the plaintiff, being then the absolute owner of the said property [and the same being free from all incumbrances, as was made to appear to the defendant], tendered to the defendant a sufficient instrument of conveyance of the same [*or*, was ready and willing, and offered, to convey the same to the defendant by a sufficient instrument,] on the payment by the defendant of the said sum.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 58.

Another Form.

FOR NOT COMPLETING A PURCHASE OF IMMOVEABLE PROPERTY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

THE FOURTH SCHEDULE—(*continued.*)

1. That by an agreement dated the day of 18 , it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant and the defendant should purchase from the plaintiff a house and land at the price of rupees, upon the terms and conditions following (that is to say)—

(*a.*) That the defendant should pay the plaintiff a deposit of rupees in part of the said purchase-money on the signing of the said agreement, and the remainder on the day of 18. , on which day the said purchase should be completed.

(*b.*) That the plaintiff should deduce and make a good title to the said premises on or before the day of 18 , and on payment of the said remainder of the said purchase-money as aforesaid should execute to the defendant a proper conveyance of the said premises, to be prepared at the defendent's expense.

2. That all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part, yet the defendant did not pay the plaintiff the remainder of the said purchase-money as aforesaid on his part.

3. That the plaintiff has thereby lost the expense which he incurred in preparing to perform the said agreement on his part, and has been put to expense in endeavouring to procure the performance thereof by the defendant.

[*Demand of judgment.*]

No. 59.

FOR NOT DELIVERING GOODS SOLD.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff [on the day of 18], and that the plaintiff should pay therefor rupees on delivery.

2. That on the [said] day the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the said goods.

3. That the defendant has not delivered the same, whereby the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[*Demand of judgment.*]

No 60.

FOR BREACH OF CONTRACT TO EMPLOY.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at the plaintiff and defendant mutually agreed that the plaintiff, should serve the defendant as [an accountant *or* in the capacity of foreman, *or as the case may be*], and that the defendant should employ the plaintiff as such, for the term of [one year], and pay him for his services rupees [monthly].

2. That on the day of 18 , the plaintiff entered upon the service of the defendant as aforesaid, and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year, whereof the defendant always had notice.

THE FOURTH SCHEDULE—(*continued.*)

3. That on the day of 18 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[*Demand of judgment.*]

No. 61.

FOR BREACH OF CONTRACT TO EMPLOY THE EMPLOYMENT NEVER TOOK EFFECT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. [*As in last preceding Form.*]

2. That on the day of 18 , at , the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

3. That the defendant refused to permit the plaintiff to enter upon such service, or to pay him for his services.

[*Demand of judgment.*]

No. 62.

[FOR BREACH OF CONTRACT TO SERVE.]

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] compensation of rupees, and the defendant should serve the plaintiff as [an artist] for the term of [one year.]

2. That the plaintiff has always been ready and willing to perform his part of the said agreement [and on the day of 18 , offered so to do.]

3. That the defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards, on the day of 18 , he refused to serve the plaintiff as aforesaid.

[*Demand of judgment.*]

No. 63.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(*Title*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant entered into an agreement, of which a copy is hereto annexed.

[*Or state the tenor of the contract.*]

THE FOURTH SCHEDULE—(*continued.*)

[2. That the plaintiff duly performed all the conditions of the said agreement on his part.]

3. That the defendant [built the house referred to in the said agreement in a bad and unworkmanlike manner.]

[*Demand of judgment.*]

No. 64.

BY THE MASTER AGAINST THE FATHER OR GUARDIAN OF AN APPRENTICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant entered into an agreement, under his hand and seal,* a copy of which is hereto annexed.

[*Or state the tenor of the contract.*]

2. That after the making of the said agreement the plaintiff received the said [*apprentice*] into his service as such apprentice for the term aforesaid, and has always performed and been ready and willing to perform all things in the said agreement on his part to be performed.

3. That on the day of 18 , the said [*apprentice*] wilfully absented himself from the service of the plaintiff, and continues so to do.

[*Demand of judgment.*]

No. 65.

BY THE APPRENTICE AGAINST THE MASTER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant entered into an agreement with the plaintiff and his [father], *E. F.*, under their hands and seals, a copy of which is hereto annexed.

2. That after the making of the said agreement the plaintiff entered into the service of the defendant with him after the manner of an apprentice to serve for the term mentioned in the said agreement, and has always performed all things in the said agreement contained on his part to be performed.

3. That the defendant has not instructed the plaintiff in the business of [*or state any other breach, such as cruelty, failure to provide sufficient food, or other ill-treatment*].

[*Demand of judgment.*]

No. 66.

ON A BOND FOR THE FIDELITY OF A CLERK.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

The form given in Act XIX of 1850 requires the seal of the father or guardian.

THE FOURTH SCHEDULE—(*continued.*)

1. That on the day of 18 , at , plaintiff employed one *E. F.* as a clerk.

2. That on the day of 18 , at . the defendant agreed with the plaintiff, *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff, whatever loss he might sustain by reason thereof, not exceeding rupees.

[*Or*, 2. That at the same time and place, the defendant bound himself to the plaintiff, by a writing under his hand, in the penal sum of rupees, conditioned that if the said *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff, and should justly account to the plaintiff for all moneys, evidences of debt, or other property which should be at any time held by him in trust for the plaintiff, the same should be void but not otherwise.]

[*Or*, 2. That at the same time and place, the defendant executed to the plaintiff a bond, a copy of which is hereto annexed.]

3. That between the day of 18 , and the day of 18 , the said *E. F.*, received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which he has not accounted to him, and the same still remains due and unpaid.

[*Demand of judgment.*]

No. 67.

By Tenant against Landlord, with Special Damage.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 at , the defendant, by an instrument in writing, let to the plaintiff [the house No. , street], for the term of years, contracting with the plaintiff, that the plaintiff and his legal representatives should quietly enjoy possession thereof for the said term.

2. That all conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. That on the day of during the said term, one *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. That the plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G. H.* and *I. J.* by such removal].

[*Demand of judgment.*]

No. 68.

For Breach of warrant of Moveables

(*Title.*)

A. B., the above-named plaintiff states as follows :—

1. That on the day of 18 , at , the defendant warranted a steam-engine to be in good working order, and thereby induced the plaintiff to purchase the same of him, and to pay him rupees therefor.

THE FOURTH SCHEDULE—(*continued.*)

2. That the said engine was not then in good working order, whereby the plaintiff incurred expense in having the said engine repaired, and lost the profits which could otherwise have accruded to him while the engine was under repair.

[*Demand of judgment.*]

No. 69.

ON AN AGREEMENT OF INDEMINTY.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the plaintiff and defendant, being partners in trade under the firm of *A. B. & C. D.*, dissolved the said partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm, and indemnity the plaintiff against all claims that might be made upon him on account of any indebtedness of the said firm.

2. That the plaintiff duly performed all the conditions of the said agreement on his part.

3. That on the day of 18 , [a judgment was recovered against the plaintiff and defendant by one *E. F.*, in the High Court of Judicature at , upon a debt due from the said firm to the said *E. F.*, and on the day of 18 , the plaintiff paid rupees [in satisfaction of the same.]

4. That the defendant has not paid the same to the plaintiff.

[*Demand of judgment.*]

No. 70.

BY SHIPOWNER AGAINST FREIGHTNOR FOR NOT LOADING.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the plaintiff and defendent entered into an agreement, a copy of which is hereto annexed.

[*Or*, 1. That on , at , the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship at on the day of 18 , five hundred tons of merchandise, which she should carry to , and there deliver, on payment of freight; and that the defendant should have days for loading, days for discharge, and days for demurrage, if required, at rupees per day.]

2. That at the time fixed by the said agreement the plaintiff was ready and willing, and offered, to receive [the said merchandise, *or*, the merchandise mentioned in the said agreement] from the defendant.

3. That the period allowed for loading and demurrage has elapsed, but the defendant has not delivered the said merchandise to the said vessel.

Wherefore, the plaintiff demands judgment for rupees for demurrage and rupees additional for compensation.

THE FOURTH SCHEDULE—(*continued.*)

C.—Plaints for Compensation upon Wrongs.

No. 71.

For Trespass on Land.

(*Title*).

A. B., the above-named plaintiff, states as follows :—

That on the day of 18 , at , the defendant entere, upon certain land of the plaintiff, known as [and depastured the same with cattle, trod down the grass, cut the timber, and otherwise injured the same].

[*Demand of judgment.*]

No. 72.

For Trespass in entering a Dwelling-house.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant entered a dwelling-house of the plaintiff called , and made a noise and disturbance therein for a long time, and broke open the doors of the said dwelling-house, and removed, took and carried away the fixtures and goods of the plaintiff therein, and disposed of the same to the defendant's own use, and expelled the plaintiff and his family from the possession of the said dwelling-house, and kept them so expelled for a long time.

2. That the plaintiff was thereby prevented from carrying on his business, and incurred expense in procuring another dwelling-house for himself and family.

[*Demand of judgment.*]

No. 73.

For Trespass on Moveables.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant broke open ten barrels of rum belonging to the plaintiff, and emptied their contents into the street [*or* sized and took the plaintiff's goods, that is to say, iron, rice and household furniture, *or as the case may be*, and carried away the same and disposed of them to his own use):

or, seized and took the plaintiff's cows and bullocks, and impounded them and kept them impounded for a long time.

2. That the plaintiff was thereby deprived of the use of the cows and bullocks during that time, and incurred expense in feeding them and in getting them restored to him ; and was also prevented from selling them at fair, as he otherwise would have done ; and the said cows and bullocks are diminished in value to the plaintiff [*otherwise, state the injury according to the facts*].

[*Demand of judgment.*]

THE FOURTH SCHEDULE—(*continued.*)

No. 74.

FOR THE CONVERSION OF MOVEABLE PROPERTY.

(*Title.*)

A. B., the above-named plaintiff, state as follows :—

1. That on the day of 18 , plaintiff was in possession of certain goods described in the schedule hereto annexed [*or*, of one thousand barrels of flour].

2. That on that day, at , the defendant converted the same to his own use, and wrongfully deprived the plaintiff of the use and possession of the same.

[*Demand of judgment.*]

The schedule.

No. 75.

AGAINST A WAREHOUSEMAN FOR REFUSAL TO DELIVER GOODS.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, in consideration of the payment to him of rupees [*or*, rupees per barrel, per month, &c.], agreed to keep in his godown [one hundred barrels of flour], and to deliver the same to the plaintiff on payment of the said sum.

2. That thereupon the plaintiff deposited with the defendant the said [hundred barrels of flour.

3. That on the day of 18 , the plaintiff requested the defendant to deliver the said goods, and tendered him rupees [*or* the full amount of storage due thereon], but the defendant refused to deliver the same.

4. That the plaintiff was thereby prevented from selling the said goods to *E. F.*, and the same are lost to the plaintiff.

[*Demand of judgment.*]

No. 76.

FOR PROCURING PROPERTY BY FRAUD.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities.]

2. That the plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees.

3. That the said representations were false [*or, state the particular falsehoods*], and were then known by the defendant to be so.

THE FOURTH SCHEDULE—(*continued.*)

4. That the defendant has not paid for the said goods. [*Or, if the goods were not delivered*, that the plaintiff, in preparing and shipping the said goods and procuring their restoration, expended rupees.]

[*Demand of judgment.*]

No. 77.

FOR FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant represented to the plaintiff that one *E. F.* was solvent and in good credit, and worth rupees over all his liabilities [*or* that *E. F.* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit.]

2. That the plaintiff was thereby induced to sell to the said *E. F.* [rice] of the value of rupees [on month's credit].

3. That the said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [*or*, to deceive and injure the plaintiff].

4. That the said *E. F.* [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same by reason of the premises.

[*Demand of judgment.*]

No. 78.

FOR POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That he is, and at all the times hereinafter mentioned was possessed of certain land called and situate in , and of a well therein, and of water in the said well, and was entitled to the use and benefit of the said well and of the said water therein, and to have certain springs and streams of water which flowed and ran into the said well to supply the same to flow or run without being fouled or polluted.

2. That on the day of 18 , the defendant wrongfully fouled and polluted the said well and the said water therein and the said springs and streams of water which followed in to the said well.

3. That by reason of the premises the said water in the said well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the said well and water.

[*Demand of judgment.*]

THE FOURTH SCHEDULE—(*continued.*)

No. 79.

FOR CARRYING ON A NOXIOUS MANUFACTURE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called situate in

2. That ever since the day of 18 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the said lands.

3. That thereby the trees, hedges, herbage and crops of the plaintiff growing on the said lands were damaged and deteriorated in value, and the cattle and live stock of the plaintiff on the said lands became unhealthy, and divers of them were poisoned and died.

4. That by reason of the premises, the plaintiff was unable to depasture the said lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the said lands as he otherwise would have had.

[*Demand of judgment.*]

No. 80.

FOR OBSTRUCTING WAY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of].

2. That he was entitled to a right of way from the said [house] over a certain field to a public highway and back again from the said highway over the said field to the said house, for himself and his servants [with vehicles, *or*, on foot] at all times of the year.

3. That on the day of 18 , defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, *or*, on foot, *or*, in any manner] along the said way [and has ever since wrongfully obstructed the same.]

4. [*State special damage, if any.*]

[*Demand of judgment.*]

Another Form.

1. That the defendant wrongfully dug a trench and heaped up earth and stones in the public highway, leading from to so as to obstruct it.

2. That thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [*or*, into the said trench] and broke his arm, and suffered great pain and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[*Demand of judgment.*]

THE FOURTH SCHEDULE—(*continued.*)

No. 81.

FOR DIVERTING A WATER-COURSE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the , in the village of , district of .

2. That by reason of such possession the plaintiff was entitled to the flow of the said stream for working the said mill.

3. That on the day of 18 , the defendant, by cutting the bank of the said stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. That by reason thereof, the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

[*Demand of judgment.*]

No. 82.

FOR OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, &c. and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. That on the day of the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[*Demand of judgment.*]

No. 83.

FOR WASTE BY A LESSEE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendant hired from him [the house No. , street] for the term of

2. That the defendant occupied the same under such hiring,

3. That during the period of such occupation, the defendant greatly injured the premises [defaced the walls, tore up the floors, and broke down the doors ; *or otherwise specify the injuries as far as possible.*]

The plaintiff prays judgment for rupees compensation.

THE FOURTH SCHEDULE—(*continued.*)

No. 84.

FOR ASSAULT AND BATTERY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

That on the day of 18 , at , the defendant assaulted and beat him.

The plaintiff prays judgment for rupees compensation.

No. 85.

FOR ASSAULT AND BATTERY, WITH SPECIAL DAMAGE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant assaulted and beat him until he became insensible.

2. That the plaintiff was thereby disabled from attending to his business for [six weeks thereafter], and was compelled to pay rupees for medical attendance, and has ever since disabled [from using his right arm]. [*Or otherwise state the damage, as the case may be.*]

[*Demand of judgment.*]

No. 86.

FOR ASSAULT AND FALSE IMPRISONMENT.

(*Title.*)

A. B., tha above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant assaulted the plaintiff and imprisoned him for days [*or* hours]; [*state special damage if any thus :—*]

2. That by reason thereof the plaintiff suffered great pain of body and mind and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business and from providing for his family by his personal care and attention, and incurred expense in obtaining his liberation from the said imprisonment [*or otherwise, as the case may be.*]

[*Demand of judgment.*]

No. 87.

FOR INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

THE FOURTH SCHEDULE—(*continued.*)

1. That on the day of 18 , the defendants were commou acrriers of passengers by railway between and

2. That on that day the plaintiff was a passenger in one of the carriages of the defendants on the said road.

3. That while he was such passenger, at [*or*, near the station of *or*, between the stations of and], a collision occurred on the said railway, caused by the negligence and unskilfulness of the defendant's servants, whereby the plaintiff was much injured [having his leg broken, his head cut, &c., *and state the special damage, if any, as*], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[*Demand of judgment.*]

Or thus:—2. That on that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, *&c., as in* § 3.]

No. 88.

FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is a shoemaker, carrying on business at
The defendant is a merchant of

2. On the [23rd May, 1875], the plaintiff was walking eastward along Chow ringhee, in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Harrington Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses, under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Harrington Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and is suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

The plaintiff claims rupees damages.

(*Title.*)

Written Statement of Defendant.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, or that it was under the charge or control of the defendant's servants. The carriage belonged to [Messrs. *E. F.* and *G. H.*] of Street, Calcutta, livery stable-keepers, employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said [Messrs. *E. E.* and *G. H.*]

THE FOURTH SCHEDULE—(*continued.*)

2. The defendant does not admit that the said carriage was turned out of Harrington Street either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says, that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements of the third paragraph of the plaint.

No. 89.

FOR LIBEL; THE WORDS BEING LIBELLOUS THEMSELVES.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the defendant published in a newspaper, called the [*or*, in a letter addressed to *E. F.*], the following words concerning the plaintiff:—

[*Set forth the words used.*]

2. That the said publication was false and malicious.

[*Demand of judgment.*]

NOTE.—If the libel was in a language not the language of the Court, set out the libel *verbatim* in the foreign language in which it was published, and then proceed thus:—" Which said words, being translated into the language, have the meaning and effect following and were so understood by the persons to whom they were so published, that is to say (*here set out a literal translation of the libel in the language of the Court.*)

No. 90.

FOR LIBEL; THE WORDS NOT BEING LIBELLOUS IN THEMSELVES.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff [is, and] was, on and before the day of 18 a merchant doing business in the city of .

2. That on the day of 18 , at , the defendant published in a newspaper, called the [*or*, in a letter addressed to *E. F. or otherwise how published*], the following words concerning the plaintiff:—

["*A. B.*, of this city, has modestly retired to foreign lands. It is said that creditors to the amount of rupees are anxiously seeking his address."]

3. That the defendant meant thereby that [the plaintiff has absconded to avoid his creditors, and with intent to defraud them.

4. That the said publication was false and malicious.

[*Demand of judgment.*]

THE FOURTH SCHEDULE—(*continued.*)

No. 91.

FOR SLANDER; THE WORDS BEING ACTIONABLE IN THEMSELVES.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the defendant falsely and maliciously spoke, in the hearing of *E. F.* [*or*, sundry persons], the following words concerning the plaintiff: ["He is a thief."]

2. That, in consequence of the said words, the plaintiff lost his situation as in the employ of

[*Demand of judgment.*]

No. 92.

FOR SLANDER; THE WORDS NOT BEING ACTIONABLE IN THEMSELVES.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the defendant falsely and maliciously said to one *E. F.* concerning the plaintiff: ["He is a young man of remarkably easy conscience."]

2. That the plaintiff was then seeking employment as a clerk, and the defendant meant, by the said words, that the plaintiff was not trustworthy as a clerk.

3. That in consequence of the said words [the said *E. F.* refused to employ the plaintiff as a clerk.]

[*Demand of judgment.*]

No. 93.

FOR MALICIOUS PROSECUTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at the defendant obtained a warrant of arrest from [a magistrate of the said city, *or*, *as the case may be*] on a charge of , and the plaintiff was arrested thereon, and imprisoned for *or* hours, and gave bail in the sum of rupees to obtain his release].

2. That in so doing, the defendant acted maliciously and without reasonable or probable cause.

3. That on the day of 18 , the said magistrate dismissed the complaint of the defendant, and acquitted the plaintiff.

4. That many persons, whose names are unknown to the plaintiff, hearing of the said arrest, and supposing the plaintiff to be a criminal, have ceased to do business

THE FOURTH SCHEDULE—(*continued.*)

with him; *or*, that, in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E. F.*, *or*, that by reason of the premises the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[*Demand of judgment.*]

D.—Plaints in Suits for Specific Property.

No. 94.

By the Absolute Owner for the Possession of Immoveable Property.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That *X. Y.* was the absolute owner [of the estate, *or*, the share of the estate, called , situate in the district of , the Government-revenue of which is rupees and the estimated value rupees, *or*, of the house No. street in the town of Calcutta, the estimated value of which is rupees].

2. That on the day of 18 , Z illegally dispossessed the said *X. Y.* of the said estate [*or* share *or* house].

3. That the said *X. Y.* has since died intestate, leaving the plaintiff, the said *A. B.*, his heir him surviving.

4. That the defendant withholds the possession of the estate [*or* share *or* house] from the plaintiff.

The plaintiff prays judgment:

(1) for the possession of the said premises;

(2) for rupees compensation for withholding the same.

Another Form.

A. B., the above-named plaintiff, states as follows:—

1. On the day of , the plaintiff, by an instrument in writing, let to the defendant a house and premises [No. 52, Russell Street, in the] for a term of five years from the day of , at the monthly rent of 300 rupees.

2. By the said instrument the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said instrument also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved whether demanded or not, should be in arrear for twenty-one days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the day of 18 , a month's rent became due, and on the day of 18 , another month's rent became due; on the day of 18 , both had been in arrear for twenty-one days, and both are still due.

THE FOURTH SCHEDULE—(*continued.*)

5. On the same day of 18 , the house and premises were not and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same is good or tenantable repair, and the plaintiff's reversion in much depreciated in value. The plaintiff claims

(1) possession of the said house and premises;

(2) rupees for arrears of rent;

(3) rupees compensation for the defendant's breach of his covenant to repair;

(4) rupees for the occupation of the house and premises from the day of 18 , to the day of recovering possession.

No. 95.

BY THE TENANT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That one *E. F.* is the absolute owner of [a piece of land in the town of Calcutta bounded as follows :], the estimated value of which is rupees .

2. That on the day of 18 , the said *E. F.* let the said premises to the plaintiff for years, from

3. That the defendent withholds the possession thereof from the plaintiff.

[*Demand of judgment.*]

No. 96.

FOR MOVEABLE PROPERTY WRONGFULLY TAKEN.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , plaintiff owned [*or* was possessed of] one hundred barrels of flour, the estimated value of which is rupees.

2. That on that day, at , the defendant took the same.

The plaintiff prays judgment:

(1) for the possession of the said goods, or for rupees in case such possession cannot be had;

(2) for rupees compensation for the detention thereof.

THE FOURTH SCHEDULE—(*continued.*)

No. 97.

FOR MOVEABLES WRONGFULLY DETAINED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , plaintiff owned [*or, state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or, describe the goods*], the estimated value of which is rupees.

2. That from that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3. That before the commencement of this suit, to wit on the day of 18 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

The plaintiff prays judgment:

(1) for the possession of the said goods, or for rupees, in case such possession cannot be had;

(2) for rupees compensation for the detention thereof.

The schedule.

No. 98.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant [*C. D.*], for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities].

2. That the plaintiff was thereby induced to sell and deliver to the said *C. D.* [one hundred boxes of tea], the estimated value of which is rupees.

3. That the said representations were false, and were then known by the said *C. D.* to be so. [*Or*, That at the time of making the said representations, the said *C. D.* was insolvent, and knew himself to be so].

4. That the said *C. D.* afterwards transferred the said goods to the defendant *E. F.* without consideration [*or* who had notice of the falsity of the representation].

The plaintiff prays judgment:

(1) for the possession of the said goods, or for rupees, in case such possession cannot be had;

(2) for rupees compensation for the detention thereof.

THE FOURTH SCHEDULE—(*continued.*)

No. 99.

FOR RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas].

2. That the plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an instrument of agreement, of which a copy is hereto annexed. But no conveyance of the same has been executed to him.

3. That on the day of 18 , the plaintiff paid the defendant rupees as part of such purchase-money.

4. That the said piece of ground contained in fact only [five bighas].

The plaintiff prays judgment :

(1) for rupees, with interest from the day of 18

(2) that the said agreement of purchase be delivered up and cancelled.

No. 100.

FOR AN INJUNCTION RESTRAINING WASTE.

(*Title.*)

A. B. the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of [*describe the property*].

2. That the defendant is in possession of the same under a lease from the plaintiff.

3. That the defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

The plaintiff prays judgment, that the defendent be restrained by injunction from committing or permitting any further waste on the premises.

[*Pecuniary compensation might also be prayed.*]

No. 101.

FOR ABATEMENT OF A NUISANCE.

(*Title*).

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No. , street Calcutta].

2. That the defendant is, and at all the said times was, the abosolute owner of [a plot of ground in the same street].

THE FOURTH SCHEDULE—(*continued.*)

3. That on the day of 18 , the defendant rected upon his said plot a slaughter-house, and still maintains the same; and erom that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite fthe said house of the plaintiff].

4. That [the plaintiff has been compelled, by reason of the premises, to abandon the said house, and has been unable to rent the same].

The plaintiff prays judgment, that the said nuisance be abated

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No. 102.

FOR AN INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

A. B., the above-named plaintiff, states as follows :—

As in form No. 81.

The plaintiff prays judgment, that the defendant be restrained by injunction from diverting the water as foresaid.

No. 103.

FOR RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION AND FOR AN INJUNCTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather, which was executed by an eminent painter], and of which no duplicate exists [*or, state any facts showing that the property is of a kind that cannot be replaced by money*].

2. That on the day of 18 , he deposited the same for safe keeping with the defendant.

3. That on the day of 18 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. That the defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. That no pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting];

The plaintiff prays judgment;

(1) that the defendant be restrained by injunction from disposing of injuring or concealing the said [painting];

(2) that he return the same to the plaintiff.

THE FOURTH SCHEDULE—(*continued.*)

No. 104.

INTERPLEADER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That before the date of the claims hereinafter mentioned, one *G. H.* deposited with the plaintiff [*describe the property*] for [safe keeping].

2. That the defendant, C. *D.*, claims the same [under an alleged assignment thereof to him from the said *G. H.*]

3. That the defendant, *E. F.*, also claims the same [under an order of the said *G. H.*, transferring the same to him.]

4. That the plaintiff is ignorant of the respective rights of the defendants.

5. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the Court shall direct.

6. That this suit is not brought by collusion with either of the defendants.

The plaintiff prays judgment:

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property;

[(3) that some person be authorized to receive the said property pending such litigation;]

(4) that upon delivering the same to such [person], the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 105.

ADMINISTRATION BY CREDITOR.

(*Title.*)

A. B., the above named plaintiff, states as follows :—

1. *E. F.* late of , was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*].

2. The said *E. F.* made his will, dated the day of and thereof appointed *C. D.* executer [*or*, devised his estate in trust, &c., *or*, died intestate, *as the case may be*].

3. The said will was proved by the said *C. D.* [*or*, Letters of administration were granted, &c.

4. The defendant has possessed himself of the moveable [and immovable, or the proceeds of the immoveable] property of the said *E. F.* and has not paid the plaintiff his said debt, day of

5. The said *E. F.* died on or about the day of

6. The plaintiff prays that an account may be taken of the moveable [and immoveable] property of the said *E. F.* deceased, and that the same may be administered under the decree of the Court.

THE FOURTH SCHEDULE—(*continued.*)

No. 106.

ADMINISTRATION BY SPECIFIC LEGATEE.

(*Title.*)

[*Alter Form No.* 105 *thus* :—]

[*Omit paragraph* 1 *and commence paragraph* 2] *E. F.*, late of , duly made his last will, dated the day of and thereof appointed *C. D.*, executor, and by such will bequeathed to the plaintiff [*here state the specific legacy.*]

For paragraph 4 *substitute*—

The defendant is in possession of the moveable property of the said *E. F.*, and, amongst other things, of the said [*here name the subject of the specific bequest.*]

For the commencement of paragraph 6 *substitute*—

The plaintiff prays that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*] or that, &c.

No. 107.

ADMINISTRATION BY PECUNIARY LEGATEE.

(*Title.*)

[*Alter Form No.* 105 *thus:*—]

[*Omit paragraph* 1 *and substitute for paragraph* 2] *E. F.*, late of , duly made his last will, dated the day of ,and thereof appointed *C. D.* executor, and by such will bequeathed to the plaintiff a legacy of rupees.

In paragraph 4, *substitute* "legacy" *for* "debt."

Another form.

Between *E. F.* ... *Plaintiff,*

and

G. H. ... *Defendant.*

E. F., the above named plaintiff, states as follows :—

1. *A. B.* of *K* in the duly made his last will, dated the [first day of March, 1873] whereby he appointed the defendant and M. N. [who died in the testator's life time] executors thereof, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2 The testator died on the [first day of July 1878], and his will was proved by the defendant on the [fourth day of October, 1878]. The plaintiff has not been married.

THE FOURTH SCHEDULE—(*continued.*)

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

The plaintiff claims—

(1) to have the moveable and immoveable property of *A. B.*, administered in this Court, and for that purpose to have all proper directions given and accounts taken;

(2) such further or other relief as the nature of the case may require.

Between *E. F.* ... *Plaintiff.*

and

G. H. ... *Defendant.*

Written Statement of Defendant.

1. *A. B.'s* will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendant sold, and which produced the nett sum of rupees , and the testator had some moveable property which the defendant got in, and which produced the nett sum of rupees.

2. The defendant applied the whole of the said sums and the sum of rupees which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the [tenth day of January, 1875], and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 108.

EXECUTION OF TRUSTS.

IN THE COURT OF , AT

Civil Suit, No.

A. B. of ... *Plaintiff,*

against

the beneficiary [or, one

C. D. of ... *Defendant.*

of the beneficiaries]

A. B., the above named plaintiff, states as follows:—

1. That he is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E. F.* and *G. H.*, the father and mother of the defendant [*or*, an instrument of assignment of the estate and effects of *E. F.* for the benefit of *C.D.*, the defendant, and other the creditors of *E. F.*]

2. The said *A. B* has taken upon himself the burden of the said trust, and is in possession of [*or*, of the proceeds of] the moveable and immoveable property conveyed [*or* assigned] by the before-mentioned deed.

THE FOURTH SCHEDULE—(*continued.*)

3. The said *C. D.* claims to be entitled to a beneficial interest under the before-mentioned deed.

4. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, *or* of part of the said, immoveable property, *or* moveable, *or* the proceeds of the sale of, *or* of part of, the said moveable property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of the said *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of the said *C. D.* and such other persons so interested as the Court may direct, or that the said *C. D.* may show good cause to the contrary.

[*N. B.—Where the suit is by a beneficiary, the plaint may be modelled,* mutatis mutandis, *on the plaint by a legatee.*]

No. 109.

FORECLOSURE OR SALE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. By a mortgage-deed dated the day of 18 , a house with the garden and appurtenances, situated within the jurisdiction of this Court, were conveyed by the defendant to him the plaintiff, his heirs [*or* executors, administrators,] and assigns, for securing the principal sum of Rs. together with interest thereon at the rate of Rs. per centum per annum, subject to redemption upon payment by the said defendant of the said principal and interest at a day long since past.

2. There is now due from the defendant to the plaintiff the sum of Rs. for principal and interest on the said mortgage.

3. The plaintiff prays (*a*) that the Court will order the defendant to pay him the said sum of Rs. with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit, on some day to be named by the Court, and in default that the right to redeem the said mortgaged premises may be foreclosed and the plaintiff placed in possession of the same premises; or (*b*) that the said premises may be sold, and the proceeds applied in and towards the payment of the amount of the said psincipal, interest and costs; and (*c*) that if such proceeds shall not be sufficient for the payment in full of such amount, the defendant do pay to the plaintiff the amount of the deficiency with interest thereon at the rate of six per cent. per annum until realization; and (*d*) that for that purpose all proper directions may be given and accounts taken by the Court.

No. 110.

REDEMPTION.

(*Title.*)

[*Alter form No.* 109 *Thus* :—]

Transpose parties and also the facts in paragraph 1.

For paragraph 2, *substitute*—

2. There is now due from the plaintiff to the defendant, for principal and interest on the said mortgage, the sum of Re. which the plaintiff is ready and willing to pay to the defendant, of which the defendant, before filing this plaint, had notice.

THE FOURTH SCHEDULE—(*continued.*)

For paragraph 8, substitute—

The plaintiff prays that he may redeem the said premises and that the defendant may be ordered to reconvey the same to him upon payment of the said sum of Rs. and interest, with such costs (if any), as the Court may order, upon a day to be named by the Court, and that the Court will give all proper directions for the preparation and execution of such re-conveyance and doing such other acts as may be necessary to put him into possession of the said premises, freed from the said mortgage.

No. 111.

SPECIFIC PERFORMANCE. (No. 1).

(*Title*).

A. B., the above-named plaintiff, states as follows :—

1. By an agreement dated the day of and signed by the above-named defendant, *C. D.*, he the said *C. D.* contracted to buy of [*or* sell to] him certain immoveable property therein described and referred to, for the sum of rupees.

2. He has applied to the said *C. D.* specifically to perform the said agreement on his part, but he has not done so.

3. The said *A. B.* has been and still is ready and willing specifically to perform the agreement on his part of which the said *C. D.* has had notice.

4. The plaintiff prays that the Court will order the said *C. D.* specifically to perform the said agreement and to do all acts necessary to put the said *A. B.* in full possession of the said property [*or* to accept a conveyance and possession of the said property] and to pay the costs of the suit.

[*N. B.—In suit for deliverg up, to be cancelled of any agreement, omit paragraphs* 2 *and* 3 *and substitute a paragraph stating generally the grounds for requiring the agreement to be delivered up to be cancelled—such as that the plaintiff signed it by mistake, under duress, or by the fraud of the defendant—and alter the prayer according to the relief sought.*

No. 112.

SPECIFIC PERFORMANCE. (No. 2.)

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendant was absolutely entitled to certain immoveable property described in the agreement hereto annexed.

2. That on the same day, the plaintiff and defendant entered into an agreement, under their hands, a copy of which is hereto annexed.

3. That on the day of 18 , the plaintiff tendered rupees to the defendant, and demanded a conveyance of the said property.

4. That on the day of 18 , the plaintiff again demanded such conveyance. [*Or*, That the defendant refused to convey the same to the plaintiff].

5. That the defendant has not executed such conveyance.

6. That the plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

The plaintiff prays judgment.

THE FOURTH SCHEDULE—(*continued.*)

(1) that the defendant execute to the plaintiff a sufficient conveyance of the said property [*following the terms of the agreement*];

(2) for rupees compensation for withholding the same.

No. 113.

PARTNERSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. He and the said *C. D.*, the defendant, have been for the space of years [*or* months] last past carrying on business together at within the jurisdiction of this Court, under certain articles of partnership in writing, signed by them respectively, [*or*, under a certain deed sealed and executed by them respectively, *or*, under a verbal agreement between them, the said plaintiff and defendant].

2. Divers disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

3. The plaintiff desires to have the said partnership dissolved, and he is ready and willing to bear his share of the debts and obligations of the partnership according to the terms of the said articles [*or*, deed, *or* agreement].

4. The plaintiff prays the Court to decree a dissolution of the said partnership, and that the accounts of the said partnership-trading may be taken by the Court, and the assets thereof realized, and that each party may be ordered to pay into Court any balance due from him upon such partnership-account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the costs of the suit may be paid, out of the partnership-assets, and that any balance remaining of such assets, after such payment and discharge, and the payment of the said costs, may be divided between the plaintiff and defendant, according to the terms of the said articles [*or* deed *or* agreement], or that, if the said assets shall prove insufficient, he the plaintiff and the said defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment and discharge of such debts, liabilities and costs. And to give such other relief as the Court shall think fit.

This plaint was filed by of , pleader for the plaintiff, [*or* by].

[*N. B.—In suits for winding-up of any partnership, omit the prayer for dissolution: but instead thereof insert a paragraph stating the fact of the partnership having been dissolved.*]

No. 114.

FORMS OF CONCISE STATEMENTS.

[Code of Civil Procedure, section 58.]

Money lent.	The plaintiff's claim is	rs. for money lent [and interest].
Several demand.	The plaintiff's claim is	rs. whereof rs. is for the price of goods sold, and rs. for money lent and rs. for interest.
Rent, Salary, &c.	The plaintiff's claim is	rs. for arrears of rent.
Interest.	The plaintiff's claim is	rs. for arrears of salary as a clerk [*or as the case may be*].
General average.	The plaintiff's claim is	rs. for interest upon money lent.
Freight, &c.	The plaintiff's claim is	rs. for general average contribution.
Bankers balance.	The plaintiff's claim is	rs. for freight and demurrage.
Fees, &c., as pleader.	The plaintiff's claim is	rs. for money deposited with the defendant as a banker.

THE FOURTH SCHEDULE—(*continued.*)

Commission.	The plaintiff's claim is rs. for fees for work done [and rs. money expended] as a pleaders.
Medical attendance	The plaintiff's claim is rs. for commission earned as [*state character—as* auctioneer, cotton-broker, &c].
Return of premium	The plaintiff's claim is rs. for medical attendances.
Warehouse-rent.	The plaintiff's claim is rs. for a return of premiums paid upon policy of insurance.
Carriage of goods.	The plaintiff's claim is rs. for the warehousing of goods.
Use and occupation of house.	The plaintiff's claim is rs. for the carriage of goods by railway.
Hire of goods.	The plaintiff's claim is rs. for the use and occupation of a house.
Work done.	The plaintiff's claim is rs. for the hire of [furniture].
Schooling	The plaintiff's claim is rs. for work done as a [surveyor].
Money received.	The plaintiff's claim is rs. for board and lodging.
Fees of office.	The plaintiff's claim is rs. for the [board, lodging and] tuition of *X. Y.*
Money over-paid.	The plaintiff's claim is rs. for money received by the defendant as pleader [*or* factor, *or* collector, *or &c.*] of the plaintiff.
	The plaintiff's claim is rs. for fees received by the defendant under colour of the office of .
	The plaintiff's claim is rs. for a return of money overcharged for the carriage of goods by railway.
	The plaintiff's claim is rs. for a return of fees overcharged by the defendant as .
Return of money by stake-holder.	The plaintiff's claim is rs. for a return of money deposited with the defendant as stake-holder.
Money won from stake-holder.	The plaintiff's claim is rs. for money entrusted to the defendant as stake-holder, and become payable to plaintiff.
Money entrusted to agent.	The plaintiff's claim is rs. for a return of money entrusted to the defendant as agent of the plaintiff.
Money obtained by fraud.	The plaintiff's claim is rs. for a return of money obtained from the plaintiff by fraud.
Money paid by mistake.	The plaintiff's claim is rs. for a return of money paid to the defendant by mistake.
Money paid for consideration which has failed.	The plaintiff's claim is rs. for a return of money paid to the defendant for [work to be done, *or*, work left undone; *or*, a bill to be taken up, *or*, a bill not taken up; *or*, *&c.*]
	The plaintiff's claim is rs. for a return of money paid as a deposit upon shares to be allotted.
Money paid by surety for defendant.	The plaintiff's claim is rs. for money paid for the defendant as his surety.
Rent paid.	The plaintiff's claim is rs. for money paid for rent due by the defendant.
Money paid on accomodation-bill.	The plaintiff's claim is rs. upon a bill of exchange accepted [*or* indorsed] for the defendant's accomodation.
Contribution by surety.	The plaintiff's claim is rs. for a contribution in respect of money paid by the plaintiff as surety.
By co-debtor.	The plaintiff's claim is rs. for a contribution in respect of a joint debt of the plaintiff and the defendant paid by the plaintiff.
Money paid for calls.	The plaintiff's claim is rs. for money paid for calls upon shares, against which the defendant was bound to indemnify the plaintiff.
Money payable under award.	The plaintiff's claim is rs. for money payable under an award.
	The plaintiff's claim is rs. upon a policy of insurance upon the life of *X. Y.* deceased.
Life-policy	The plaintiff's claim is rs. upon a bond to secure payment of rs. and interest.
Money-bond.	The plaintiff's claim is rs. upon a judgment of the Court in [the Emipre of Russia].
Foreign judgment.	The plaintiff's claim is rs. upon a cheque drawn by the defendant
Bills of Exchange, &c.	The plaintiff's claim is rs. upon a bill of exchange accepted [*or* drawn, *or* indorsed] by the defendant.
	The plaintiff's claim is rs. upon a promissory note made [*or* indorsed] by the defendant.
	The plaintiff's claim is rs. against the defendant's *A. B.*, as acceptor, and defendants, *C. D.*, as drawer [*or* indorsor] of a bill of exchang .
Surety.	The plaintiff's claim is rs. against the defendants as surety for a price of goods sold.

THE FOURTH SCHEDULE—(*continued.*)

The plaintiff's claim is rs against the defendant, *A B*, as principal, and against the defendant, *C. D.*, as surety for the price of goods sold [*or* for arrears of rent, *or* for money lent, *or* for money received by the defendant, *A B*, as traveller for the plaintiff, *or &c.*]

Calls. The plaintiff's claim is rs. for calls upon shares.

Indorsement for Costs, &c.

[*Add to the above forms*] and rs. for costs; and if the amount claimed be paid to the plaintiff or his pleader within days [*or if the summons is to be served out of the jurisdiction, insert the time for appearance limited by the order* [from the service hereof further proceedings will be stayed.

Damages and other Claims.

Agent, &c. The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [and rs. for arrears of wages.]

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor [*or, &c.*,] of the plaintiff [and rs. for money received as factor, *or &c.*]

Apprentices. The plaintiff's claim for damages for breach of the terms of a deed of apprenticeship of *X. Y.* to the defendant [or plaintiff.]

Arbitration. The plaintiff's claim is for damages for non-compliance with the award of *X. Y.*

Assult, &c. The plaintiff's claim is for damages for assult (and false imprisonment, and for malicious prosecution.

By husband and wife The plaintiff's claim is for damages for assult and false imprison-) ment of the plaintiff, *C. D.*

Against husband and wife. The plaintiff's claim is for damages for assault by the defendant, *C. D.*

Pleader. The plaintiff's claim is for damages for injury by the defendant's negligence as pleader of the plaintiff.

Bailment. The plaintiff's claim is for damages for negligence in the custody of goods [and for wrongfully detaining the same].

Pledge. The plaintiff's claim is for damages for negligence in the keeping of goods pawned [and for wrongfully detaining the same].

Hire. The plaintiff's claim is for damages for negligence in the custody of furniture [*or*, a carriage] lent on hire, [and for wrongfully, &c.]

Banker. The plaintiff's claim is for damages for wrongfully neglecting [*or* refusing] to pay the plaintiff's cheque.

Bill. The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

Bond. The plaintiff's claim is upon a bond conditioned not to carry on the trade of a .

Carrier. The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.

The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.

Charter-party. The plaintiff's claim is for damages for breach of charter-party of ship [*Mary*].

Claim for return of goods; damages. The plaintiff's claim is for return of household furniture, [*or, &c.*, or their value, and for damages for retaining the same.

Damages for depriving goods. The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c.

Defamation. The plaintiff's claim is for damages for libel.

The plaintiff's claim is for damages for slander.

Wrongful distress. The plaintiff's claim is for damages for improperly distraining,

THE FOURTH SCHEDULE—(*continued.*)

[*This Form shall be sufficient whether the distress complained of be wrongful or excessive, or irregular*).

Ejectment. The plaintiff's claim is to recover possession of a house, No. in Street, or of a farm called Blackacre, situate in the of in the of)

To establish title and recover rents. The plaintiff's claim is to establish his title to (*here describe property* and to recover the rents thereof.

(*The two previous forms may be combined*).

Fishery. The plaintiff's claim is for damages for infringment of the plaintiff's right of fishing.

Fraud. The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse (*or* a business, *or* shares, *or*, *&c.*)

The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of *A. B.*

The plaintiff's claim is for damages for breach of a contract of guarantee for *A. B.*

Guarantee. The plaintiff's claim is for damages for breach of a contract to idemnify the plaintiff as the defendant's agent to distrain

Insurance. The plaintiff's claim is for a loss under a policy upon the ship (*Royal Charters*, and freight of cargo (*or* for return of premiums).

(*This Form shall be sufficient whether the loss claimed be total or partial.*)

Fire-insurance. The plaintiff's claim is for a loss under a policy of fire-insurance upon house and furniture.

The plaintiff's claim is for damages for breach of a contract to ensure a house.

Landlord and tenant. The plaintiff's claim is for damages for breach of a contract to keep a house in repair.

Landlord and tenant. The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

Medical man. The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man.

Mischievous animal. The plaintiff's claim is for damages for injury by the defendant's dog.

Negligence. The plaintiff's claim is for damages for injury to the plaintiff by the negligent driving of the defendant or his servants.

The plaintiff's claim is for damages for injury to the plaintiff while a passenger of the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station from the defective condition of the station.

Act XIII of 1855. The plaintiff's claim is as executor of *A. B.*, deceased, for damages for the death of the said *A. B.*, from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants.

Promise of marriage. The plaintiff's claim is for damages for breach of promise of marriage.

Sale of goods. The plaintiff's claim is for damages for breach of contract to accept and pay for goods.

The plaintiff's claim is for damages for non-delivery (*or* short delivery, *or* defective quality, *or other breach of contract of sale*) of cotton (*or &c.*).

The plaintiff's claim is for damages for breach of warranty of a horse.

Sale of land. The plaintiff's claim is for damages for breach of contract to sell (*or* purchase) land.

The plaintiff's claim is for damages of breach of contract to let (*or* take) a house.

The plaintiff's claim is for damages for breach of contract to sell (*or* purchase) the lease, with good will, fixtures, and stock in trade of a public house.

The plaintiff's claim is for damages for breach of covenant for title (*or* for quiet enjoyment; *or &c.* in a conveyance of land.

Trespass on land. The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well (*or* cutting his grass, *or* felling his timber, *or* pulling down his fences, *or* moving his gate *or* using

THE FOURTH SCHEDULE—(*continued.*)

his road or path, *or* crossing his field, *or* depositing sand there, or carrying away gravel from thence, *or* carrying away stones from his river.

Support. The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or* house, *or* mine].

Way. The plaintiff's claim is for damages for wrongfully obstructing a way, [public highway *or* private way].

The plaintiff's claim is for damages for wrongfully diverting [*or* obstructing *or* polluting, *or* diverting water from] a water course.

Water course, &c. The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land *or* into the plaintiff's mine.

The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.

Pasture. The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.

[*This Form shall be sufficient whatever the nature of the right to pasture be.*]

Light. The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house.

Patent. The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

Copyright. The plaintiff's claim is for damages for the infringement [of the plaintiff's copyright.

Trademark. The plaintiff's claim is for damages for wrongfully using [*or* imitating] the plaintiff's trademark.

Work. The plaintiff's claim is for damages for breach of a contract to build a ship [*or* to repair a house, *&c*].

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, &c.

Nuisance. The plaintiff's claim is for damages to his house, trees, crops, &c.. caused by noxious vapours from the defendant's factory (*or*, &c.)

The plaintiff's claim is for damages from nuisance by noise from the defendant's works (*or* stables, *or*, *&c.*)

Injunction. (*Add to endorsement*) :—and for an injunction.

(*Add to indorsement where claim is to land, or to establish title, or both*) :—

Mense profits. and for mense profits.

Arrears of rent. and for an account of rents or arrears of rent.

Breach of covenant. and for breach of covenant for (repairs).

1. *Creditor to administer Estate.*

The plaintiff's claim is as a creditor of *X. Y.*, of , deceased, to have the moveable and immoveable property of the said *X. Y.*, administered. The defendant, *C. D.*, is sued as the administrator of the said *X. Y.*, (and the defendants, *E. F.* and *G. H.*, as his co-heirs at law).

2. *Legatee to administer Estate.*

The plaintiff's claim is as a lagatee under the will dated the day of 18 . of *X. Y.*, deceased, to have the moveable and immoveable property of the said *X. Y.*, administered. The defendant, *C. D.*, is sued as the executor of the said *X. Y.* (and the defendants *E. F.* and *G. H.*, as his devisees).

3. *Partnership.*

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant (under articles of partnership dated the day of) and to have the affairs of the partnership wound up.

4. *By Mortgagee.*

The plaintiff's claim is to have an account taken of what is due to him for principal interest and costs on a mortgage dated the day of , made between (*parties*) (*or*, by deposit or title deeds), and that the mortgage may be enforced by foreclosure or sale.

THE FOURTH SCHEDULE—(*continued.*)

5. *By Mortgagor.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between (*parties*), and to redeem the property comprised therein.

7. *Execution of Trusts.*

The plaintiff's claim is to have the trusts of an indenture dated and made between (*parties*) carried into execution.

6. *Raising Portions.*

The plaintiff's claim is that the sum of rs. which by a deed of settlement, dated was provided for the portions of the younger children of may be raised.

8. *Cancellation or Rectification.*

The plaintiff's claim is to have a deed dated and made between (*parties*) set aside or rectified.

9. *Specific Performance.*

The plaintiff's claims is for specific performance of an agreement dated the day of for the sale by the plaintiff to the defendant of certain (freehold) hereditaments at

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No. 115.

PROBATE.

By an executor or legatee propounding a will in solemn form.

The plaintiff claims to be executor of the last will dated the day of of *C. D.*, late of , deceased, who died on the day of and to have the said will established. This summons is issued against you as one of the next-of-kin of the said deceased (*or, as the case may be*).

2. *By an executor or legatee of a former will, or a next-of-kin, &c., of the deceased, seeking to obtain the revocation of a probate granted in common form.*

The plaintiff claims to be executor of the last will dated the day of of *C. D.*, late of , deceased, who died on the day of and to have the probate of a pretended will of the said deceased, dated the day of revoked. This summons is issued against you as the executor of the said pretended will (*or, as the case may be*).

3. *By an executor or legatee of a will when letters of administration have been granted as in an intestacy.*

The plaintiff claims to be executor of the last will of *C. D.*, late of deceased, who died on the day of , dated the day of .

The plaintiff claims that the grant of letters of administration of the estate of the said deceased obtained by you should be revoked and probate of the said will granted to him.

4. *By a person claiming a grant of administration as a next-of-kin of the deceased, but whose interest as next-of-kin is disputed.*

The plaintiff's claims is to be the brother and sole next-of-kin of *C. D.*, of , deceased, who died on the day of , intestate, and to have as such a grant of administration to the personal estate of the said intestate. This writ is issued against you because you have entered a caveat, and have alleged that you are the next-of-kin of the deceased (*or, as the case may be*).

THE FOURTH SCHEDULE—(*continued.*)

F.—MISCELLANEOUS.

No. 116.

Section 58 the Code of Civil Procedure.

COURT of the of holden at

REGISTER OF CIVIL SUITS in the year 18

Date of presentation of plaint.	No. of Suit.	PLAINTIFF.			DEFENDANT.			CLAIM.			APPEARANCE.			JUDGMENT.			APPEAL.		EXECUTION.					RETURN OF EXECUTION.		
		Name.	Description.	Place of abode.	Name.	Description.	Place of abode.	Particulars.	Amount of value.	When the cause of Action accrued.	Day for parties to appear.	Plaintiff.	Defendant.	Date.	For whom.	For what, or amount.	Date of Appeal.	Judgment in Appeal.	Date of application.	Date of Order.	Against whom.	For what and amount of money	Amount of costs.	Amount paid into Court.	Arrested.	Minute other return than Payment or arrest, and date of every return.

THE FOURTH SCHEDULE—(*continued.*)

No. 117.

SUMMONS FOR DISPOSAL OF SUIT.

Sections 64 and 68 of the Code of Civil Procedure.

(*Title.*)

To

dwelling at

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court at any time before the trial, on your depositing their necessary subsistence-money.

2. If you admit the demand, you should pay the money into Court with the costs of the suit, to avoid the summary execution of the decree, which may be against your person or property, or both, if necessary.

WHEREAS
has instituted a suit against you for
you are hereby summoned to appear in this Court in person or by a duly authorized pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions on the day of 18 , at o'clock in the forenoon, to answer the above-named plaintiff; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence; and you will bring with you, or send by your pleader , which the plaintiff desires to inspect, and any documents on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

NOTE.—*If written statements are required, say*—You are (*or such a party s, as the case may be*) required to put in a written statement by the day of

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No. 118.

SUMMONS FOR SETTLEMENT OF ISSUES.

Sections 64 and 68 of the Code of Civil Procedure.

(*Title.*)

To

dwelling at

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord you can have summonses from this Court to compel

WHEREAS
has instituted a suit against you for
you are hereby summoned to appear in this Court in person or by a duly authorised pleader of the Court, duly instructed, and able to answer all material questions

THE FOURTH SCHEDULE—(*continued.*)

the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court at any time before the trial, on your depositing their necessary subsistence-money.

2. If you admit the demand, you should pay the money into Court with the costs of the suit, to avoid the summary execution of the decree, which may be against your person or property, or both, if necessary.

relating to the suit, or who shall be accompanied by some other person able to answer all such questions, on the day of 18 , at o'clock in the forenoon, to answer the above-named plaintiff; and you are hereby required to take notice that, in default of your appearance on the day before mentioned, the issuses will be settled in your absence; and you will bring with you, or send by your pleader , which the plaintiff desires to inspect, and any document on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

NOTE.—*If written statements are required, say*—You are (*or* such a party is, *as the case may be*) *required* to put in a written statement by the day of

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No. 119.

SUMMONS TO APPEAR.

Section 68 of the Code of Civil Procedure.

No. of Suit.

IN THE COURT OF AT Plaintiff.

Defendant.

To

(*Name, description and address.*)

WHEREAS [*here enter the name, description and address of the plaintiff*] has instituted a suit in this Court against you [*here state the particulars of the claim as in the register*]: you are hereby summoned to appear in this Court in person on the day of at in the forenoon [*If not specially required to appear in person, state*—"in person or by a pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions"] to answer the above-named plaintiff. (*If the summons be for the final disposal of the suit, this further direction shall be added here*; "and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day"); and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and

THE FOURTH SCHEDULE—(*continued.*)

determined in your absence; and you will bring with you (or send by your agent) [*here mention any document the production of which may be required by the plaintiff*], which the plaintiff desires to inspect, and any document on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 120.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT.

Section 85 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

The day of 18

WHEREAS it is stated in the plaint that , the defendant in the above suit is at present residing in , but that the right to sue accrued within the jurisdiction of this Court: it is ordered that a summons returnable on the day of 18 be forwarded for service on the said defendant, to the Court of with a duplicate of this proceeding.

L. S.

Judge.

THE FOURTH SCHEDULE—(*continued.*)

No. 121.

TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT.

Section 85 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

The day of 18

A. B. of

against

C. D.

Read proceeding from the of forwarding

for service on in

civil No. of that Court.

Read bailiff's endorsement on the back of the process stating that the and proof of the above having been duly taken by me on the [oath *or*] affirmation of and it is ordered that the be returned to the with a copy of this proceeding.

L. S.

Judge.

NOTE.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

No. 122.

DEFENDANT'S STATEMENT.

Section 110 of the Code of Civil Procedure.

(*Title.*)

I, the undersigned defendant [or one of the defendants], disclaim all interest under the will of the said *E. F.* in the plaint, named [*or*, as heir-at-law, *or*, as next-of-kin, *or* one of the next-of-kin, of *E. F.*, deceased, in the said plaintiff named].

Or, I, the undersigned defendant, state that I admit [*or* deny] [*here repeat in the language of the plaint the statements admitted or denied*].

Or, I, the undersigned defendant, submit that, upon the facts stated in the plaint, it does not appear that there is any agreement which can be legally enforced [*or*, that it appears upon the said plaint that I am jointly liable with one *E. F.*, who is not a party to the suit, and not severally liable as by the plaint appears, *or*, that it appears by the said plaint that *G. H.* should have been a joint-plaintiff with the said *A. B.* in said suit, *or*, *as the case may be.*]

THE FOURTH SCHEDULE—(*continued.*)

Or, that the plaintiff has conveyed his interest in the said mortgage [*or*, right to redeem] to one *I. J.*, [*or*, that I have conveyed or assigned to *H. L.* by way of further charge for securing the sum of Rs. , the right to redeem in the property sought by the suit to be foreclosed].

Or, that since the dissolution of the partnership the plaintiff has executed an instrument whereby the plaintiff covenants to discharge all debts and liabilities of the partnership, and generally to release me from all claims and liabilities either by or to himself and others in respect of the said partnership-trading [*or, as the case may be*].

(*Signed*) *C. D.*,

Defendant.

No. 123.

INTERROGATORIES.

Section 121 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B.

against

C. D., *E. F.* and *G. H.*

Interrogatories on behalf of the above-named *A. B.* [*or C. D.*] for the examination of the above-named [*E. F.* and *G. H.*, *or A. B.*]

1. Did not, &c.
2. Has not, &c.

The defendant *E. F.* is required to answer the interrogatories numbered

The defendant *G. H.* is required to answer the interrogatories numbered

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No. 124.

FORM OF NOTICE TO PRODUCE DOCUMENTS.

Section 131 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil suit, No. of 18

A. B.

against

C. D.

Take notice that the plaintiff [*or* defendant] requires you to produce for his inspection the following documents referred to in your plaint [*or* written statement, *or* affidavit], dated the day of 18

THE FOURTH SCHEDULE—(*continued.*)

Describe documents required.

X. Y., Pleader for the plaintiff [*or* the defendant.]

To *Z.*,
Pleader for the defendant (*or* plaintiff].

No. 125.

SUMMONS TO ATTEND AND GIVE EVIDENCE.

Sections 159 and 163 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS your attendance is required to on behalf of the in the above cause, you are hereby required [personally to appear before this Court] on the day of 18 , at the hour of A.M (and) to bring with you or to send to this Court .

A sum of Rs. , being your travelling and other expenses and subsistence-allowance for one day, is herewith sent. If you do not comply with this order, you will be subject to the consequence of non-attendance laid down in the Code of Civil Procedure, section 170.

Notice—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are to be detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 126.

Another Form.

No of Suit.

IN THE COURT OF AT

Plaintiff.

Defendant.

To

[*Name, description and address.*]

You are hereby summoned to appear in this Court in person on the day of at in the forenoon, to give evidence on behalf of the plaintiff [*or* the defendant] in the

THE FOURTH SCHEDULE—(*continued.*)

above-mentioned suit, and to produce [*here describe with convenient certainty any document the production of which may be required. If the summons be only to give evidence, or if it be only to produce a document, it must be expressed accordingly*], and you are not to depart thence until you have been examined [*or* have produced the document] and the Court has risen, or unless you have obtained the leave of the Court.

FORMS OF DECREES.

No. 127.

SIMPLE MONEY-DECREE

(*Title.*)

Claim for

THIS cause coming on for final disposal before in the presence of , on the part of the plaintiff, and on the part of the defendant, it is ordered that the do pay to the the sum of Rs. , with interest thereon at the rate of per cent. per from to the date of realization of the said sum, and do also pay to the the costs of this suit as taxed by the officer of the Court, with interest thereon at the rate aforesaid from the date of taxation to the date of realization.

Costs of suit.

PLAINTIFF.	Rs.	A.	P.	DEFENDANT.	Rs.	A.	P.
1. Stamp for plaint ...				Stamp for power ...			
2. Do. for power ...				Do. petition ...			
3. Do. exhibits ...				Pleader's fee ...			
4. Pleader's fees on Rs. ...				Subsistence for witnesses...			
5. Translation-fee ...				Service of process ...			
6. Subsistence for witness for attendance ...				Translation-fee ...			
7. Commissioner's fee ...				Commissioners fee ...			
8. Service of process ...							
9. &c.							
TOTAL ...				TOTAL ...			

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

THE FOURTH SCHEDULE—*(continued.)*

No. 129.

DECREE FOR SALE IN A SUIT BY A MORTGAGEE OR PERSON ENTITLED TO A LIEN.

(Title.)

It is ordered that it be referred to the Registrar [*or* Taxing Officer] to take an account of what is due to the plaintiff for principal and interest on the mortgage [*or* lien] mentioned in the plaint, and to tax the plaintiff's costs of this suit, and that the Register [*or* Taxing Officer] do declare in court on the day of what he shall find to be due for principal and interest as aforesaid, and for costs; And upon the defendant paying into court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months from the date of declaring in court the amount so due; it is ordered that the plaintiff do reconvey the said mortgaged premises free and clear from all incumbrances done by him, or any claiming by, from, or under, him, and do deliver up to the defendant or to such person as he appoints all documents in his custody or power relating thereto, and that upon such reconveyance being made, and documents being delivered up, the Registrar [*or* Taxing Officer] shall pay out to the plaintiff the said sum so paid in as aforesaid for principal, interest and costs; but in default of the defendant paying into court such principal, interest and costs as aforesaid by the time aforesaid, then it is ordered that the said mortgaged premises [*or* the premises subject to the said lien] be sold with the approbation of the Registrar [*or* Taxing Officer]. And it is ordered that the proceeds of such sale (after defraying thereout the expenses of the sale) be paid into court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest and costs as aforesaid, and that the balance (if any) shall be paid to the defendant or other person entitled to receive the same.

No. 129.

FINAL DECREE FOR FORECLOSURE.

(Title.)

WHEREAS it appears to the Court that the defendant has not paid into court the sum which was on the day of last declared in court to be due to the plaintiff for principal an interest upon the mortgage in the plaint mentioned, and for costs, pursuant to the order made in this suit on the day of last, and that the period of six months has elapsed since the said day of

It is ordered that the defendant do stand absolutely debarred of all right to redeem the said mortgaged premises.

No. 130.

PRELIMINARY ORDER—ADMINISTRATION-SUIT.

Section 213 of the Code of Civil Procedure.

(Title.)

It is ordered that the following accounts and inquiries be taken and made; that is to say:—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

THE FOURTH SCHEDULE—(*continued.*)

In suits by legatees—

2. An account be taken of the legacies given by the testator's will.

In suits by next-of-kin.

An inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next-of-kin [*or*, one of the next-of-kin] of the intestate.

[*After the first paragraph, the Order will, where necessary, order, in a creditor suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph, and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.*]

3. An account of the funeral and testamentary expenses.

4. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

5. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

6. And it is further ordered. that the defendant do, on or before the day of next, pay into court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or to his use.

7. And that if the *Registrar* shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into court.

8. And that Mr. *E. F.* be Receiver in the suit [*or* proceeding], and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the Registrar [and shall give security by bond for the due performance of his duties to the amount of rupees].

9. And it is further ordered, that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say,—

(*a*) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death;

(*b*) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased, or any part thereof.

(*c*) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

10. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

11. And it is ordered, that *G. H.* shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the Registrar, and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

12. And it is further ordered, that for the purpose of the inquiries hereinbefore directed, the Registrar shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the Registrar to give the most useful publicity to such inquiries.

13. And it is ordered, that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of and that the Registrar do certify the result of the inquiries and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

14. And, lastly, it is ordered, that this suit [*or* matter] stand adjourned for making final decree to the day of

[*Such part only of this order is to be used as is applicable to the particular case.*]

THE FOURTH SCHEDULE—(*continued.*)

No. 131.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.

Section 213 of the Code of Civil Procedure.

1. It is ordered that the defendant do on or before the day of pay into court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs. for interest, at the rate of Rs. per centum per annum, from the day of to the day of amounting together to the sum of Rs.

2. Let the Registrar [*or* Taxing Officer] of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid, as follows :—

(*a*).—The costs of the plaintiff to Mr. , his attorney [*or* pleader], and the costs of the defendant to Mr. , his attorney [*or* pleader].

(*b*).—And (*if any debts are due*) with the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, let the sums found to be owing to the several creditors mentioned in the schedule to the Registrar's certificate, together with subsequent interest on such of the debts as bear interest, be paid; and after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

Section 213 of the Code of Civil Procedure.

1. Declare that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff;

2. And it is ordered, that an account be taken of what is due for principal and interest on the said legacy;

3. And it is also ordered, that the defendant do within weeks after the date of the Registrar's certificate, pay to the plaintiff the amount of what the Registrar shall certify to be due for principal and interest;

4. And it is ordered, that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

Section 213 of the Code of Civil Procedure.

1. Let the Registrar of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E. F.*, the intestate, within one week after the taxation of the said costs by the said Registrar, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered, that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows :—

(*a*).—Let the defendant, within one week after the taxation of said costs by the Registrar as aforesaid, pay one-third share of the said residue to the plaintiffs *A. B.*, and *C.*, his wife, in her right, as the sister and one of the next-of-kin of the said *E. F*, the intestate.

THE FOURTH SCHEDULE—(*continued.*)

(*b.*)—Let the defendant retain for her own use one other third share of the said residue as the mother, and one other of the next-of-kin of the said *E. F.*, the intestate.

(*c.*)—And let the defendant, within one week after the taxation of the said costs by the Registrar as aforesaid, pay the remaining one-third share of the said residue to *G. H.*, as the brother and the other next-of-kin of the said *E. F.*, the intestate.

No. 132.

ORDER—DISSOLUTION OF PARTNERSHIP.

Section 125 of the Code of Civil Procedure.

(*Title.*)

It is declared that the partnership in the plaint mentioned between the plaintiff and defendant ought to stand dissolved as from the day of , and it is ordered that the dissolution thereof as from that day be advertised in the *Gazette, &c.*

And it is ordered that be the Receiver of the partnership-estate and effects in this suit, and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership ;

2. An account of the debts and liabilities of the said partnership ;

3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the Registrar may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken and all the other acts required to be done be completed before the day of , and that the Registrar do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

And, lasty, it is ordered that this suit stand adjourned for making a final decree to the day of

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No. 133.

PARTNERSHIP—FINAL DECREE.

Section 215 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No.

A. B. of

against

C. D. of

It is ordered that the fund now in court, amounting to the sum of Rs. be applied as follows :—

THE FOURTH SCHEDULE—(*continued.*)

1. In payment of the dates due by the partnership set forth in the Registrar's certificate amounting in the whole to Rs.

2. In payment of the costs of all parties in this suit, amounting to Rs. [*These costs must be ascertained before the decree is drawn up*].

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership assets, of the sum of Rs. , being the residue of the said sum of Rs. now in court, to the defendant as his share of the partnership-assets.

[*Or*, And that the remainder of the said sum of Rs. be paid to the said plaintiff [*or* defendant] in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

And that the defendant [*or* plaintiff] do on or before the day of pay to the plaintiff [*or* defendant] the sum of Rs. being the balance of the said sum of Rs. due to him, which will then remain due.

No. 134.

CERTIFICATE OF NON-SATISFACTION OF DECREE.

Section 224 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

CERTIFIED that no [*or* partial, *as the case may be, and if partial, state to what extent*], satisfaction of the decree of this Court, in Civil Suit No. of 18 , a copy of which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

GIVEN under my hand and the seal of the Court, this day of 18

L. S

Judge.

No. 135.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE.

Section 248 of the Code of Civil Procedure.

IN THE COURT OF AT

THE FOURTH SCHEDULE—*(continued.)*

Civil Suit, No. of 18

Miscellaneous, No. of 18

A. B. of

against

C. D. of

To

WHEREAS has made application to this Court for execution of decree in Civil Suit No. 18 , this is to give you notice that you are to appear bef re this Court on the day of 18 , either in person, or by a pleader of this Court, or agent duly authorized and instructed, to show cause, if any, why execution should not be granted.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 136.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN DEFENDANT'S POSSESSION IN EXECUTION OF A DECREE FOR MONEY.

Section 254 of the Code of Civil Procedure.

(*Title*)

TO THE BAILIFF OF THE COURT.

WHEREAS was ordered, by decree of this Court, passed on the day of 18 , in Suit No. of 18 pay to the plaintiff the sum of Rs. as noted in the margin; and wherers the said sum of Rs. has not been paid

THESE ARE TO COMMAND YOU to attach the moveable property of the said as set forth in the list hereunto annexed, or which shall be pointed out to you by the said , and unless the said shall pay to you the said sum of Rs. together with Rs. , the costs of this attachment, to hold the same until further orders from this Court.

YOU ARE FURTHER COMMANDED to return this Warrant on or before the day of 18 , with an endorsement certifying the date and manner in which it has been executed, or why it has not been executed.

DECREE.			
Principal ...			
Interest ...			
Costs ...			
Costs of decree ...			
Interest thereon..			
Total of attachment ...			
TOTAL ...			

THE FOURTH SCHEDULE—(*continued.*)

GIVEN under my hand and the seal of the Court, this day of 18

Schedule.

L. S.

Judge.

No. 137.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, &C.

Section 263 of the Code of Civil Procedure.

(*Title.*)

TO THE BAILIFF OF THE COURT.

WHEREAS in the occupancy of has been decreed to , the plaintiff in this suit; you are hereby directed to put the said in possession of the same, and you are hereby authorized to remove any person who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 138.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY, TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 18 in favour of for Rs. : it is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said that is to say, to which the defendant is

THE FOURTH SCHEDULE—(*continued.*)

entitled, subject to any claim of the said , and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 139.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 18 , in Civil Suit, No of 18 , in favour of for Rs. : it is ordered that the defendant be, and hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely and that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 140.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN A PUBLIC COMPANY, &C.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

Defendant, and to ; Manager of

Company.

WHEREAS has failed to satisfy a decree passed against

THE FOURTH SCHEDULE—*(continued.)*

on the day of 18 , in Civil Suit, No. of 18
in favour of for Rs.
it is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of
shares in the aforesaid Company, namely,
or from receiving payment of any dividends thereof; and you
, the Manager of the said Company, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 141.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY.

Section 274 of the Code of Civil Procedure.

(Title.)

To Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the day of 18 , in Civil Suit, No. of 18 , in favour of for Rs. : it is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from alienating the property specified in the schedule hereunto annexed, by sale, gift, or otherwise, and that all persons, be, and that they are hereby, prohibited from receiving the same by purchase, gift, or otherwise.

GIVEN under my hand and the seal of the Court, this day of 18 .

Schedule.

L. S.

Judge.

No. 142.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OF ANY SECURITY IN THE HANDS OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT.

Sections 272 and 486 of the Code of Civil Procedure.

IN THE COURT OF AT
Civil Suit, No. of 18 .

A. B.

against

C. D. of

To

SIR,

The plaintiff having applied, under section of the Code of Civil Procedure for an attachment of certain money now in your hands (*here state how the money is supposed*

THE FOURTH SCHEDULE—(*continued.*)

to be in the hands of the person addressed, on what account, &c.), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,

Sir,

You most obedient Servant,

L. S.

Judge.

Dated the day of 18

No. 143.

ORDER FOR PAYMENT TO THE PLAINTIFF, &C., OF MONEY, &C., IN THE HANDS OF A THIRD PARTY.

Section 277 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

Miscellaneous, No. of 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT AND TO

WHEREAS the following property has been attached in execution of a decree in Civil Suit, No. of 18 , passed on the day of 18 , in favour of for Rs. ; it is ordered that the property so attached, consisting of Rs. in money, and Rs. in Currency notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you the said , to , and that the said property so far as may be necessary for the satisfaction of the said decree, shall be sold by you, the Bailiff of the Court, by public auction in the manner prescribed for sale in execution of decrees, and that the money which may be realized by such sale, or a sufficient part thereof to satisfy the said decree, shall be paid over to the said and the remainder, if any, shall be paid to you, the said

GIVEN under my hand and the seal of the Court, this day of 18 ;

L. S.

Judge.

THE FOURTH SCHEDULE—(*continued.*)

No. 144.

NOTICE TO ATTACHING CREDITOR.

Section 278 of the Code of Civil Procedure.

IN THE COURT OF AT .

Civil Suit, No. of 18 .

Miscellaneous, No. of 18 .

A. B. of

against

C. D. of

To

WHEREAS has made application to this Court for the removal of attachment on placed at your instance in execution of the decree in Civil Suit, No. of 18 , this is to give you notice to appear, before this Court on , the day of , 18 , either in person or by a pleader of the Court duly instructed, to support your claim, as attaching creditor.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 145.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY.

Section 287 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

Miscellaneous, No. of 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

THESE ARE TO COMMAND YOU to sell by auction, after giving day's previous notice, by affixing the same in this court-house, and after making due proclama-

THE FOURTH SCHEDULE—(*continued.*)

tion, * the
property attached under a warrant from this Court dated the day of 18 , in execution of a decree in favour of in suit No. of 18 , or so much of the said property as shall realize the sum of Rs. , being the of the said decree and costs still remaining unsatisfied.

YOU ARE FURTHER COMMANDED to return this warrant on or before the day of 18 , with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

* This proclamation shall specify the time, the place of sale, the property to be sold, the revenue assessed, should the property consist of land paying revenue to Government, and the amount for the recovery of which the sale is ordered, and as fairly and accurately as possible the other particulars required by section 287 to be specified.

No. 146.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN EXECUTION.

Section 300 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

To

WHEREAS has been the purchaser at sale by auction in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said to any person except the said

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

THE FOURTH SCHEDULE—(*continued.*)

No. 147.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER.

Section 301 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

To

and to

WHEREAS has become he purchaser at a public sale in execution of the decree in the above suit of certain debt due from you to you , that is to say , it is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of, the said debt to any person or persons except the said

GIVEN under my hand and the seal of the Court, this day of

L. S.

Judge.

No. 148.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION.

Section 301 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

To

and Manager of Company.

WHEREAS has become the purchaser at a public sale in execution of the decree, in the above suit of certain shares in the above Company, that is to say, of standing in the name of you , it is ordered that you be, and you are hereby prohibited from making any transfer of the said shares to any person except the said the purchaser aforesaid, or from receiving any dividends thereon; and you , Manager of the said Company, from permitting any such transfer or making any such payment to any person except the said , the purchaser aforesaid.

THE FOURTH SCHEDULE—(*continued.*)

GIVEN under my hand and the seal of th Court, this day of 18 .

L. S.

Judge.

No. 149.

ORDER CONFIRMING SALE OF LAND, &C.

Section 312 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B of

against

C. D. of

WHEREAS the following land [*or* immoveable property] was on the day of 18 sold by the Bailiff of this Court in execution of the decree in this suit; and whereas days have elapsed and no application has been made [*or* objection allowed] to the said sale, it is ordered that the said sale be, and the said sale is hereby, confirmed.

GIVEN under my hand and the seal of the Court, this day of 18 .

schedule.

L. S.

Judge.

No. 150.

CERTIFICATE OF SALE OF LAND.

Section 316 of the Codo of Civil Procedure.

IN THE COURT OF AT .

Civil Suit, No. of 18 .

A. B. of.

against

C. D. of

THE FOURTH SCHEDULE—(*continued.*)

THIS is to certify that has been declared the purchaser at execution of decree in this suit, and that the said sale has been duly confirmed by the Court.

GIVEN under my hand and the sale of the Court, this day of 18

L. S.

Judge.

No. 151.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION.

Section 318 of the Code of Civil Procedure.

N THE COURT OF AT .

Civil Suit, No of 18 .

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS has become the certified purchaser of at a sale in execution of the decree in Civil Suit No. of 18 ; and whereas such land is in the possession of , you are hereby ordered to put the said , the certified purchaser, as aforesaid, into possession of the said and if need be, to remove any person who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of

L. S.

Judge.

No. 152.

AUTHORITY TO THE COLLECTOR TO STAY PUBLIC SALE OF LAND.

Section 326 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

To *Collector of*

SIR,

In answer to your communication No. , dated , representing that the sale in execution of the decree in this suit of and, lying

THE FOURTH SCHEDULE—(*continued.*)

within your district,
paying revenue to Government, is objectionable, I have the honor to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you instead of proceeding to a public sale of

I have the honour to be,

Sir,

Your obedient Servant,

L. S.

Judge.

No. 153.

ORDER FOR COMMITTAL FOR RESISTING, &c., EXECUTION OF DECREE FOR LAND

Section 329 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS it appears to the Court that has without just cause resisted [*or* obstructed] the execution of the decree of the Court passed against on the day of 18 , in Civil Suit, No. of 18 , whereby certain land or immoveable property was adjudged to , it is ordered that the said be committed to custody for a period of days.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 154.

WARRANT OF ARREST IN EXECUTION.

Section 337 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18
Miscellaneous, No. of 18

A. B. of

against

C. D. of

THE FOURTH SCHEDULE—*(continued.)*

TO THE BAILIFF OF THE COURT.

WHEREAS was adjudged by a decree of the Court, in No. of 18 , dated 18 , to pay to the plaintiff the sum of Rs. as noted in the margin, and whereas the said sum of Rs. has not been paid to the said plaintiff in satisfaction of the said decree, these are to command you to arrest the said defendant, and unless the said defendant shall pay to you the said sum of Rs. , together with Rs. for the costs of executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the day of 18 , with an endorsement certifying the day and manner in which it has been executed, or the reason why it has not been executed.

Principal			
Interest			
Costs			
Execution			
TOTAL ...			

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 155.

NOTICE OF PAYMENT INTO COURT.

Section 377 of the Code of Civil Procedure.

IN THE COURT OF 18

B. No.

A. B. v. *C. D.*

TAKE notice that the defendant has paid into Court Rs. , and says that the sum is enough to satisfy the plaintiff's claim [*or* the plaintiff's claim for, &c.]

To Mr. *X. Z.*,

the Plaintiff's Pleader,

Defendant's Pleader.

THE FOURTH SCHEDULE—*(continued.)*

No. 156.

COMMISSION TO EXAMINE ABSENT WITNESSES.

Section 386 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18 .

A. B. of

against

C. D. of

To

WHEREAS the evidence of is required by the in the above suit; and whereas you are requested to take the examination on interrogatories [*or* vivâ voce] of such witnesses and you are hereby appointed a Commissioner for that purpose, and you are further requested to make return of such examination so soon as it may be taken [process to require the attendance of the witness will be issued by this Court on your application]*

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

* Not necessary where the commission goes to another Court.

No. 157.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS.

Sections 392 and 394 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for should be issued; you are hereby appointed Commissioner for the purpose of [process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this Court on your application.]*

* Not necessary where the commission goes to another Court.

THE FOURTH SCHEDULE—*(continued.)*

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 158.

WARRANT OF ARREST BEFORE JUDGMENT.

Section 478 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS , the plaintiff in the above suit, has proved to the satisfaction of the Court that there is probable cause for believing, that the defendant is about to , these are to command you to take the said into custody, and to bring before the Court, in order that he may show cause why he should not furnish security to the amount of rupees for personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until execution or satisfaction of any decree that may be passed against in the suit.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 159.

ORDER FOR COMMITTAL.

Section 481 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No of 18

A. B. of

against

C. D. of

To

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of the to answer any

THE FOURTH SCHEDULE—(*continued.*)

defendant
judgment that may be passed against in the suit; and whereas the Court has called upon the defendant to furnish in such security, or to offer a sufficient deposit in lieu of security, which has failed to do; it is ordered that the said defendant be committed to custody until the decision of the suit; or if judgment be given against , until the execution of the decree.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 16.

ATTACHMENT BEFORE JUDGMENT WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE.

Section 484 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit ; these are to command you to call upon the said defendant on or before the day of either to furnish security for the sum of rupees to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to fulfil any decree that may be passed against , or to appear and show cause why should not furnish security; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court, and in what manner you shall have executed this warrant make appear to the Court immediately after the execution hereof, and have you here then this warrant.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

THE FOURTH SCHEDULE—*(continued.)*

No 161.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO FURNISH SECURITY.

Section 485 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS , the plaintiff in this suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against in the suit, and whereas the Court has called upon the said to furnish such security which has failed to do ; these are to command you to attach the properby of the said and keep the same under safe and secure custody until the further order of the Court, and in what manner you shall have executed this warrant make appear to this Court immediately after the execution hereof, and have you here then this warrant.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge

No. 162.

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY, TO WHICH THE DEFENDANT IS ENTITLED, SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSONS TO THE IMMEDIATE POSSESSION THEREOF.

Section 486 of the Code of Civil Procedure,

IN THE COURT OF AT

Civil Suit, No. of 18 .

A. B. of

against

C. D. of

To

Defendant.

It is ordered that you the said be, and you are hereby, prohibited and restrained until the further order of this Court from receiving

THE FOURTH SCHEDULE—*(continued.)*

from the following property in the possession of the said that is to say to which the defendant is entitled, subject to any claim of the said and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any persons whomsoever.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 163.

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY.

Section 486 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18 :

A. B. of

against

C. D. of

To

Defendant.

It is ordered that you the said be, and you are hereby, prohibited and restrained, until the further order of this Court, from alienating the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 18 .

Schedule.

L. S.

Judge.

No. 164.

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY IN THE HANDS OF OTHER PERSONS, OR OF DEBTS NOT BEING NEGOTIABLE INSTRUMENTS.

Section 486 of the Code Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

To

It is ordered that the defendant be, and he is hereby, prohibited and restrained, until the further order of this Court, from receiving

THE FOURTH SCHEDULE—*(continued.)*

from the [money now in hands belonging to the said defendant *or* debts *as the case may be, describing them*] and that the said be, and hereby, prohibited and restrained, until the further order of this Court, from making payment of the said [money, &c.], or any part thereof, to any person whomsoever.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 165.

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF SHARES IN A PUBLIC COMPANY, &C.

Section 486 of the Code of Civil Procedure.

Civil Suit, No. of 18 .

IN THE COURT OF AT

A. B. of

against

C. D. of

To Defendant and to Manager of Company.

It is ordered that , the defendant, be, and hereby, prohibited and restrained, until the further order of the Court, from making any transfer of shares being in the aforesaid Company, or from receiving payment of any dividends thereof, and you Manager of the said Company, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 166.

TEMPORARY INJUNCIONS.

Section 492 of the Code of Civil Procedure.

Upon motion made unto this Court by , Pleader of [*or* Counsel for] the plaintiff *A. B.*, and upon reading the petition of the said plaintiff in this matter filed [this day] [*or* the plaint filed in this cause on the day of , *or* the written statement of the said plaintiff filed on the

THE FOURTH SCHEDULE—*(continued.)*

day of] and upon hearing the evidence of and in support thereof, [*if after notice and defendant not appearing : add*, and also the evidence of as to service of notice of this motion upon the defendant, *C. D.*] This Court doth order that an injunction be awarded to restrain the defendant, *C. D.*, his servants, workmen and agents from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [*or* in the written statement, *or* petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No. 9, Oilmongers Street, Hindupur, in the Taluq of and from selling the materials whereof the said house is composed, until the hearing of this cause or until the further order of this Court.

Dated this day of 18 .

Civil Judge.

[*Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus :—*] to restrain the defendants and from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [*or* bill of exchange] in question, dated on or about the , *&c.*, mentioned in the plaintiff's plaint [*or* petition] and the evidence heard at this motion until the hearing of this cause, or until the further order of this Court.

[*In Copyright cases*] to restrain the defendant, *C. D.*, his servants, agents or workmen from printing, publishing, or vending a book, called , or any part thereof, until the, *&c.*

[*Where part only of a book is to be restrained*] to restrain the defendant, *C. D.*, his servants, agents or workmen from printing, publishing, selling, or otherwise disposing of such parts of the book in the plaint [*or* petition and evidence, *&c.*,] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled and also that part which is entitled [*or* which is contained in page to page both inclusive] until the , *&c.*

[*In patent cases*] to restrain the defendant *C. D.* his agents, servants and workmen, from making or vending any perforated bricks [*or as the case may be*] upon the principle of the inventions in the plaintiff's plaint [*or* petition, *&c.*, *or* written statement, *&c.*,] mentioned belonging to the plaintiff's or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [*or as the case may be*] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, *&c.*

[*In cases of Trademarks*] to restrain the defendant, *C. D.*, his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [*or, as the case may be*] described as or purporting to be blacking manufactured by the plaintiff, *A. B.*, in bottles having affixed thereto such labels as in the plaintiff's plaint [*or* petition, *&c.*] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff *A. B.*, and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff, *A. B.*, until the, *&c.*

[*To restrain a partner from in any way interfering in the business*]

to restrain the defendant, *C. D.*, his agents and servants, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security, in the name of the partnership-firm of *B. & D.*, and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing or causing to be done, any act, in the name or on the credit of the said partnership-firm of *B. & D.*, or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking, until the, *&c.*

THE FOURTH SCHEDULE—*(continued.)*

No. 167.

NOTICE OF APPLICATION FOR INJUNCTION.

Section 494 of the Code of Civil Procedure.

IN THE COURT OF AT

A. B. of

against

C. D. of

TAKE notice that I, *A. B.*, intend to apply at the sitting of the Court at aforesaid, on the day of for an injunction to restrain *C. D.* from further prosecuting a suit which he has commenced against me in to recover damages for the breach of the contract for the specific performance of which this suit was commenced [*or* to restrain him from receiving and giving discharges for any of the debts due to the partnership in the matter of the partnership between us for the winding up of which the suit was commenced *or* from digging the turf from the land which was agreed to be sold by him to me by the agreement, to specific performance of which this suit is commenced to enforce [*or, as the case may be*].

Dated this day of 18 .

To C. D.

A. B.

[*N. B.—Where the injunction is to be applied for against a party whose name and address do not appear upon any proceeding already filed in the suit, such name and address must be stated in full to enable the proper officer to serve the notice.*

No. 168.

APPOINTMENT OF A RECEIVER.

Section 503 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of 18

A. B. of

against

C. D. of

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 18 , in favour of : you are hereby (subject to your giving security to the satisfaction of the *Registrar*) appointed Receiver of the said property under section 503 of the Code of Civil Procedure, with full powers under the provisions of that section.

YOU are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

THE FOURTH SCHEDULE—*(continued.)*

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 169.

BOND TO BE GIVEN BY RECEIVER.

Section 503 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit, No. of

A. B. of

against

C. D. of

KNOW all men by these presents that we, *I. J.* of, &c., and *K. L.* of, &c., *M. N.* of, &c., are jointly and severally bound to *G. H.*, *Registrar* of the Court of in Rs. , to be paid to the said *G. H.* or his attorney, executors, administrators or assigns. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 18 .

And whereas a plaint has been filed in this Court by *A. B.* against *C. D.* for the purpose [*here insert object of suit*].

And whereas the said *I. J.* has been appointed, by order of the above-mentioned Court, to receive the rents and profits of the immoveable property, and to get in the outstanding moveable property of *O. P.*, the testator in the said plaint named.

Now the condition of this obligation is such, that if the above-bounden *I. J.* shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property of the said *O. P.* [*or, as may be*] at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

I. J.

K. L.

M. N.

Signed and delivered by the above-bounden in the presence of

NOTE.—*If deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond.*

THE FOURTH SCHEDULE—*(continued.)*

No. 170.

ORDER OF REFERENCE TO ARBITRATION UNDER AGREEMENT OF PARTIES.

Section 508 of the Code of Civil Procedure.

(Title.)

To

WHEREAS the above-mentioned plaintiff and defendant have agreed to refer the matters in difference between them in the above suit to your arbitration and award, you are hereby appointed accordingly to determine all the said matters in difference between the parties, and with power, by consent of the parties, to determine which party shall pay the costs of this reference.

You are required to deliver your award in writing to this Court on or before the day of 18 , or such other day as this Court may further fix.

Process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this Court on your application, and you are empowered to administer to such witnesses oath or affirmation.

A sum of Rs. , being your fee in the above suit, is herewith forwarded.

GIVEN under my hand and the seal of the Court. this day of 18 :

L. S.

Judge.

No. 171.

ORDER OF REFERENCE TO ARBITRATION BY COURT, WITH CONSENT.

Section 508 of the Code of Civil Procedure.

(Title.)

Upon reading a petition of the plaintiff, filed this day, and on the consent of for the defendant, and upon hearing for the plaintiff and for the defendant, it is ordered, by and with the consent of all the parties, that all matters in difference in this suit, including all dealings and transactions between all parties, be referred to the final determination of , who is to make his award in writing and submit the same to this Court, together with all proceedings, depositions and exhibits in this suit, within one month from the date hereof. And it is ordered further, by and with the like consent, that the said arbitrator is to be at liberty to examine the parties and their witnesses upon oath or affirmation, which he is empowered to administer, and that the said arbitrators shall have all such powers or authorities as are vested in arbitrators under the Code of Civil Procedure, including therein power to call for all books of account that he may consider necessary. And it is further ordered, by and with the like consent, that the costs of this suit, together with the costs of reference to arbitration, up to and including the award of the said arbitrator, and the enforcement thereof, do abide the result of the finding of the said arbitrator. And it is further ordered, by and with the like consent, that the said arbitrator be at liberty to appoint a competent accountant to assist him in the investigation of the several matters referred to him as aforesaid, and that the remuneration of such accountant and other charges attending thereto be in the discretion of the said arbitrator.

THE FOURTH SCHEDULE—*(continued.)*

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 172.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT.

Section 532 of the Code of Civil Procedure.

NO. OF SUIT.

IN THE COURT OF AT Plaintiff.

To Defendant.

[*Here enter the defendant's name, description and address.*]

WHEREAS [*here enter the plaintiff's name, description and address*] has instituted a suit in this Court against you under Chapter XXXIX of the Code of Civil Procedure for Rs. principal and interest [*or* Rs. balance of principal and interest] due to him as the payee [*or* endorsee] of a bill of exchange [*or* hundi *or* promissory notes,] of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof, inclusive of the day of such service, to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. [*here state the sum claimed*] and the sum of Rs. for costs.

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

[*Here copy the bill of exchange, hundi or promissory note, and all endorsements upon it.*]

MEMORANDUM OF APPEAL.

Section 541 of the Code of Civil Procedure:

MEMORANDUM OF APPEAL

[*Name, &c., as in Register.*] Plaintiff—Appellant

(*Name, &c., as in Register.*) Defendant—Respondent.

[*Name of Appellant*] [plaintiff *or* defendant] above-named appeals to the High Court at [*or* District Court at , *as the case may be*] against the decree of in the above suit dated the day of , for the following reasons, namely, [*here state the grounds of objection.*]

THE FOURTH SCHEDULE—(*continued.*)

No. 174.

REGISTER OF APPEALS.

Section 548 of the Code of Civil Procedure.

COURT (*OR* HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES in the year 18

Date of Memorandum.	No. of Appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANE.			JUDGMENT.		
		Name.	Description.	Place of abode	Name.	Description.	Place of abode	Of what Court	No. of Original Suit.	Particulars.	Amount or Value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or altered.	For what or Amount.

THE FOURTH SCHEDULE—*(continued.)*

No. 175.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL.

Section 553 of the Code of Civil Procedure.

IN THE COURT OF AT

, *Appellant*, v. , *Respondent.*

APPEAL from the of the Court of

dated the day of 18 .

Respondent.

To

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 18 has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided *ex-parte* in your absence.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

NOTE.—*If a stay of execution has been ordered, intimation should be given of the fact on this notice.)*

No. 176.

DECREE ON APPEAL.

Section 579 of the Code of Civil Procedure.

IN THE COURT OF AT

, *Appellant*, v. , *Respondent.*

APPEAL from the of the Court of dated the day of 18 .

Memorandum of Appeal.

, *Plaintiff.*
, *Defendant.*

Plaintiff (*or* defendant) above-named appeals to the Court at against the decree of in the above suit, dated the day of 18 , for the following reasons, namely :

[*here state the reasons.*]

This appeal coming on for hearing on the day of 18 before , in the presence of or the Appellant, and of for the Respondent, it is ordered—

[*here state the relief granted.*]

The costs of this appeal, amounting to less , are to be paid by The costs of the original suit are to be paid by

GIVEN under my hand, this day of 18 .

L. S.

Judge.

THE FOURTH SCHEDULE—(*continued.*)

No. 177.

REGISTER OF APPEALS FROM APPELLATE DECREES.

Section 587 of the Code of Civil Procedure.

HIGH COURT AT

REGISTER OF APPEALS FROM APPELLATE DECREES.

Date of Memorandum.	No. of Appeal.	Appellant.			Respondent.			Decree Appealed from.				Appearance.			Judgment.		
		Name.	Description.	Place of abode.	Name.	Description.	Place of abode.	Of what Court.	No. of Original suit and of appeal.	Particulars.	Amount or Value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or altered.	For what, or Amount.

THE FOURTH SCHEDULE—*(concluded.)*

No. 178.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED.

Section 626 of the Code of Civil Procedure.

IN THE COURT OF AT

, *Plaintiff*, v. , *Defendant*

To

TAKE notice that has applied to this Court for a review of its judgment passed on the day of 18 in the above case. The day of 18 is fixed for you to show cause why the Court should not grant a review of its judgment in this case.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 179.

NOTICE OF CHARGE OF PLEADER.

IN THE COURT OF AT

A. B. of

against

C. D. of

TO THE REGISTRAR OF THE COURT.

TAKE notice that I, *A. B.* [*or C. D.*], have hitherto employed as my pleader *G. H.* of in the above-mentioned cause, but that I have ceased to employ him, and that my present pleader is *J. K.* of .

[*A. B. or C. D.*]

No. 180.

MEMORANDUM TO BE PLACED AT FOOT OF EVERY SUMMONS, NOTICE, DECREE OR ORDER OF COURT, OR ANY OTHER PROCESS OF THE COURT.

Hours of attendance at the office of the Registrar [*place of office*] from *ten* till *four*, except on [*here insert the day on which the office will be closed*], when the office will be closed at *one*.

R. J. CROSTHWAITE,

Offg. Secy. to the Govt. of India.

APPENDIX.

AN ACT FOR ESTABLISHING HIGH COURTS OF JUDICATURE IN INDIA.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

High Courts may be established in the several Presidencies of India.

1. It shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* Division of the Presidency of *Fort William* aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies, respectively. Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit, and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf.

Constitution of High Court.

2. The High Court of Judicature at *Fort William* in *Bengal*, and at the Presidencies of *Madras* and *Bombay* respectively, shall consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty may, from time to time, think fit and appoint, who shall be selected from

1*st.* Barristers of not less than five years' standing; or

2*nd.* Members of the Covenanted Civil Service of not less than ten years' standing, and who shall have served as Zillah Judges, or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period; or,

3*rd.* Persons who have held Judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years; or,

4*th.* Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years, if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court:

Provided that no less than one-third of the Judges of such High Courts respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service.

Certain existing Judges herein named to be the first Judges of the High Court.

3. Provided always that the persons who, at the time of the establishment of such High Court in any of the said Presidencies, are Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewanny Adawlut or Sudder Adawlut of the same Presidency, shall be and become Judges of the High Court without further appointment for that purpose; and the Chief Justice of such upreme Court shall become the Chief Justice of such High Court.

Tenure of office of High Court.

4. All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure: Provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of *India* in Council or Governor in Council of the Presidency in which such High Court is established.

Precedence of Judges of High Court.

5. The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court, and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court, and except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their Patents.

Salaries, &c., of Judges of the High Courts.

6. Any Chief Justice or Judge, transferred to any High Court from the Supreme Court, shall receive the like salary, and, be entitled to the like retiring pension and advantage, as he would have been entitled to for and in respect of service in the Supreme Court, if such Court had been continued, his service in the High Court being reckoned as service in the Supreme Court; and, except as aforesaid, it shall be lawful for the Secretary of State in Council of *India* to fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same: Provided always that such alteration shall not affect the salary of any Judge appointed prior to the date thereof.

Provision for vacancy of the office of Chief Justice or other Judge.

7. Upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice, the Governor-General in Council or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council, or Governor in Council, as the case may be, to appoint a person, with such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council or Governor in Council, as aforesaid, shall see cause to cancel the appointment of such acting Judge.

Abolition of Supreme Court and Sudder Courts.

8. Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William* in *Bengal*, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at *Calcutta*, in the same Presidency, shall be abolished:

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished:

And upon the establishment of such High Court in the Presidency of *Bombay*, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished.

And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency.

Jurisdiction and powers of High Courts.

9. Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil, and criminal jurisdiction beyond the limits of the Presidency Town as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts.

The High Court ordered, under this section, the real plaintiffs, though strangers to the record, to pay costs—*Bama Soonduree Dossee* vs. *Anund Lal Bose*, Bourke, 45, 96; 14 W. R., O. Ap., 1; but see *Ram Coomar Coondoo* vs. *Chunder Cant Mookerjee*, 4 L. R., Ind. App., 49.

High Courts to exercise same jurisdiction as Supreme Courts.

10. *Until the Crown shall otherwise provide under the powers of this Act, all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts respectively.*

Repealed by 28 Vic., c. 15, s. 2, *post*.

Existing provisions applicable to Supreme Courts to apply to High Courts.

11. Upon the establishment of the said High Courts in the said Presidencies, respectively, all provisions then in force in *India* of Acts of Parliament, or of any Orders of Her Majesty in Council, or Charters, or of any Acts of the Legislature of *India*, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at *Fort William* in *Bengal*, *Madras* and *Bombay*, respectively, or to the Judges of those Courts, shall be taken to be applicable to the said High Courts, and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council.

12. From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last-mentioned Courts, shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.

Provision as to pending proceedings in abolished Courts.

13. Subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

Power to High Courts to provide for exercise of jurisdiction of single Judges or Division Courts.

14. The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

Chief Justice to determine what Judges shall sit alone or in the Division Court.

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts, and from time to time to alter any such rule or form or table; and the rules so made, and the forms so framed, and the tables so settled, shall be used and observed in the said Courts; provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall, before they are issued, have received the sanction, in the Presidency of *Fort William* of the Governor-General in Council, and in *Madras* or *Bombay*, of the Governor in Council, of the respective Presidencies.

High Court to superintend and to frame rules of practice for Subordinate Courts.

Under this section, the High Court may direct the exercise of a power or jurisdiction disclaimed by a Court or may interfere and set aside an order made without jurisdiction; but it cannot interfere on the ground that an order passed by a Court having jurisdiction is erroneous—*Tij Ram* vs. *Hursukh*, 1 Ind., All., 101, and the cases cited at p. 104: In the matter of *Lukhy Kant Bose*, 1 Ind. Cal., 180.

Refusal by District Judge to admit an application for review. High Court will not interfere under section 15 of the Charter Act—*Ram Lall Singh* vs. *Janki Mahatoon*, 4 C.L.R., 14.

16. It shall be lawful for Her Majesty, if at any time hereafter Her Majesty see fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in *India*, not included within the limits of the local jurisdiction

Her Majesty may establish a High Court in the North-Western Provinces.

of another High Court, to consist of a Chief Justice and of such number of other Judges, with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time may think fit and appoint; and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and subject to the directions of such Letters Patent, all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court and to the Governor-General or Govenor of the Presidency in which such High Court is established, shall, as far as circumstances may permit, be applicable to the High Court established in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories.

Other or supplementary Charters may be granted within three years after establishment of a Court.

17. It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishmeut of any High Court under this Act by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent, or without any such revocation as aforesaid, by like Letters Patent, to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.

The period within which fresh Letters might be granted was extended to the 1st January 1866 by section 1 of the 28 Vic., c. 15, *post*.

Territorial limits of jurisdiction of Court may be altered by order in Council.

18. *It shall be lawful for Her Majesty from time to time, by Her Majesty's Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet.*

Repealed by 28 Vic., c. 15, s. 2, *post*.

Interpretation of terms.

19. The word "Barrister" in this Act shall be deemed to include Barristers of *England* or *Ireland*, or Members of the Faculty of Advocates in *Scotland;* and the words "Governor-General and Governor" shall comprehend the officer administering the Government.

LETTERS PATENT.

Constituting the High Court of Judicature for the Bengal Division of the Presidency of Fort William, dated 14*th May* 1862, *revocked by further Letters Patent,* 28*th December* 1865.

Recital of Acts 24 and 25 Vic., c. 104.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, To all to whom these presents shall come, greeting, Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of our reign, entitled "An Act for establishing High Courts of Judicature in India" it was, amongst other

things, enacted that it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal division of the Presidency of Fort William aforesaid, and that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared: Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature, and permanent Judges of the Court of Sudder Dewanny Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at *Calcutta*, in the said Presidency, should be abolished.

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Town as might be prescribed thereby; and save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts.

Establishment of High Court at Fort William.

1. Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge and mere motion, have thought fit to erect and establish, and by these presents We do, accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal division of the Presidency of Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature at Fort William in Bengal, and We do hereby constitute the said Court to be a Court of Record.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the said High Court of Judicature at Fort William in Bengal shall, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and thirteen Judges, the first Chief Justice being Sir Barnes Peacock, Knight, and seven of the Judges, being Sir Charles Robert Mitchel Jackson, Knight, Sir Mordaunt Lawson Wells, Knight, Henry Thomas Raikes, Esq., Charles Binny Trevor, Esq., George Loch, Esq., Henry Vincent Bayley, Esq., and Charles Steer, Esq., according to the appointments made by the said Act; and We do hereby constitute and appoint John Paxton Norman, Esq., Walter Morgan, Esq., Francis Baring Kemp, Esq., Walter Scott Seton-Karr, Esq., and Louis Stuart Jackson, Esq., being respectively qualified, as in the said Act is declared, to be Judges of the said High Court.

Declaration to be made by Judges.

3. And We do hereby ordain that the Chief Justice and every Judge of the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authoritiy or person as the Governor-General in Council may commission to receive it:—

"I, *A. B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge, and judgment."

Seal.

4. And We do hereby grant, ordain, and appoint the said High Court of Judicature at Fort William in Bengal, shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Fort William in Bengal." And we do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of Section 7 of the recited Act; and We do further grant, ordain, and appoint that, whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

Writs, &c., to issue in name of the Crown and under Seal.

5. And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders, and other mandatory process to be used, issued, or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.

Appointment of officers.

6. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council, and shall be either confirmed or disallowed by the Governor-General in Council. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct, and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long

as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules.

Admission of Advocates, Vakeels, and Attorneys.

Powers of High Court in admitting Advocates, Vakeels, and Attorneys.

7. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit and enrol such and so many Advocates as to the said High Court shall seem meet, who shall be and are hereby authorized to appear and plead for the suitors of the said High Court, subject to the rules and directions of such Court.

8. And We do further authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Vakeels as to the said High Court shall seem meet, who shall be and are hereby authorized to appear, plead, and act for the suitors of the said High Court, subject to the rules and directions of such Court.

9. And We do further authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Attorneys-at-law as to the High Court shall seem meet; who shall be and are hereby authorized to appear and act for the suitors of the said High Court, subject to the rules and directions of such Court.

See note on Procedure, p. 5, *ante*.

In making rules for the qualifications, &c., of Advocates, Vakeels, and Attorneys.

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be empowered to remove, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law, and no person whatsoever, but such Advocates or Vakeels, shall be allowed to plead for, or on behalf of, any suitor in the said High Court; and no person or persons whatever, but such Vakeels or Attorneys-at-law shall be allowed to act for any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf, or on behalf of a co-suitor.

To Act. See *Horan* v. *Dewan Ali*, 8 Ben, 418.

Civil Jurisdiction of the High Court.

Local limits of the ordinary original jurisdiction of the High Court.

11. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law or regulation made by the Governor-General in Council, and until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council on the 10th day of September in the year of our Lord one thousand seven hundred and ninety-four, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

Original jurisdiction as to suits.

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within the local limits of the ordinary original jurisdiction of the said High Court, except that it shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees.

See pp. 42—48, *ante*.

Extraordinary original civil jurisdiction.

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

The application should be made to the Judge sitting on the original side—*Doucett* vs. *Wise*, 4 W. R., Mis., 7. It will be granted when, it has been shown to the satisfaction of the Court—*Courjon* vs. *Courjon*, 4 Ben., App., 10, that the lower Court has dealt harshly and without discretion, with the applicant; and the decision turns mainly on points of law—*Kopilnath Sahai Deo* vs. *Government*, 10 Ben., 168; or that difficult points of law arise, and where generally it appears to be a case that should not be tried in the Mofussil—*Doucett* vs. *Wise*, 1 Ind., Jur. (N. S.,) 94, provided the interests of the applicant will be prejudiced if the case be not transferred—*Borradaile* vs. *Gregory*, Bourke, 1. See also in the matter of *decree suits in the Court of the Munsif of Debrooghur*, 7 Ben., 305, *Payn* vs. *Administrator-General*, 6 C. L. R., 221.

The substantive law applicable to the case will be the law of the Court from which it has been transferred—*Grose* vs. *Amertamayi Dasi*, 4 Ben., 1.

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

14. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment, in all cases of original civil jurisdiction, of one or more Judges of the said High Court, or of any Division Court, pursuant to section 18 of the said recited Act. Provided always that no such appeal shall lie to the High Court as aforesaid from any such decison made by a majority of the full number of Judges of the said High Court, but that the right of appeal in such case shall be to Us, Our heirs or successors, in Our or Their Privy Council in manner hereinafter provided.

Appeal from Courts in the Provinces.

15. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts, whether within or without the said Bengal Division, from which there is now an appeal to the Court of Sudder Dewanny Adawlut at Calcutta, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Dewanny Adawlut, by virtue of any laws or regulations now in force, or shall become subject to appeal to the

said High Court by virtue of such laws or regulations relating to Civil Procedure as shall be hereafter made by the Governor-General in Council.

Jurisdiction as to infants and lunatics.

16. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Bengal Division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta.

Provision with respect to the Insolvent Court.

17. And We do further ordain that the Court for relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, whether within or without the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

Law to be administered by the High Court of the Bengal Division of the Presidency of Fort William in Civil Cases.

By the High Court in the exercise of ordinary original civil jurisdiction.

18. We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall (until otherwise provided) be the law or equity which would have been applied by the said Supreme Court at Calcutta to such case if these Letters Patent had not issued.

In the exercise of extraordinary original civil jurisdiction.

19. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of is extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

LAW AND EQUITY—See *Madhub Chunder Poramanick* vs. *Rajcoomar Doss*, 14 Ben., 76; *Grose* vs. *Amertamaye Dasi*, 4 Ben., 11.

By High Court in the exercise of appellate jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

21. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and in respect of all persons beyond such limits over whom the said Supreme Court at Calcutta now has criminal jurisdiction.

Jurisdiction as to persons.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal Division of the Presidency of Fort William, and shall have authority to try, at its discretion, any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other Officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.
Court may reserve points of law.

24. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed on any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review on certificate of the Advocate-General.

25. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

The Court can quash or confirm a conviction—*Reg.* vs. *Ghose*, 25 W. R., 36.

Appeal from Criminal Courts in the Provinces.

26. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts whether within or without the said Bengal Division, from which there is now an appeal to the Court of the Sudder Nizamut Adawlut at Calcutta, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Nizamut Adawlut, by virtue of any laws or regulations now in force, or shall become subject to appeal to the said High Court by virtue of such laws or regulations relating to Criminal Procedure as shall be hereafter made by the Governor-General in Council.

Hearing of referred cases and revision of criminal trials.

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other Officers authorized to refer

cases to the Sudder Nizamut Adawlut, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said Court of Sudder Nizamut Adawlut, whether within or without the Bengal Division of the Presidency of Fort William, or shall become subject to such reference to, or revision by, the said High Court by virtue of such laws or regulations relating to Criminal Procedure as shall be hereafter made by the Governor-General in Council.

High Court may direct the transfer of a case from one Court to another.

28. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate to try it, though such case belongs, in ordinary course, to the jurisdiction of some other Officer or Court.

The High Court has power to transfer the investigation or trial of any criminal offence committed in Calcutta to a Mofussil Court or to direct the High Court to try any offence committed in the Mofussil—*Reg.* vs. *Nabadwip Gosami*, 1 Ben. Cr., 15. A single Judge on the original side, has power to entertain an application for the removal of a case from the Mofussil to the High Court—*Reg.* vs. *Amir Khan*, 7 Ben., 240.

Criminal Law.

Offenders to be punished under Indian Penal Code

29. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as to a Court of Appeal, reference, or revision, charged with any offence for which provision is made by Act XLV of 1860, called the "Indian Penal Code," shall be liable to punishment under the said Act, and not otherwise, subject nevertheless to such alterations, modifications, and additions in and to such Code as may have been or may be prescribed by any Acts or Regulations made by the Governor-General in Council.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Judges may be authorized to sit in any places by way of circuit or special commission.

30. And We do further ordain that, whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the Sudder Dewanny Adawlut or Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal Division of the Presidency of Fort William other than the usual place of sitting of the said High Court or at several such places by way of circuit, and the Governor-General in Council shall, by his commission for that purpose, authorize and direct any of the Judges of such Court to hold sittings in such place or places accordingly at or within such times as by such commission may be authorized or directed, the Judge or Judges acting under such commission in the places and manner therein directed, shall have and exercise the same jurisdiction, power and authority as would be had and exercised by a Judge or Judges of ts eqaid High Court, as the case may be, in its ordinary place of sitting.

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

31. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such Civil and Maritime jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by any Judge of the said Court as Commissary to the Vice-Admiralty Court, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as is now vested in any Commissioner or Commissioners appointed by Us or Our predecessors, under the powers given by an Act passed in the Session of Parliament held in the thirty ninth and fortieth years of the reign of His late Majesty King George the Third, "for establishing further Regulations for the government of the British territories in India, and the better administration of justice within the same."

See *Garland* vs. *Dragoon*, 1 Hyde, 275.

Criminal.

32. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such criminal jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by such Commissary to the Vice-Admiralty Court, or by any such Commissioner or Commissioners as aforesaid.

Testamentary and Intestate Jurisdiction.

Repeal of certain parts of former Letters Patent as to ecclesiastical jurisdiction.

33. And We do further ordain that so much of the Letters Patent bearing date the twenty-sixth day of March in the fourteenth year of the reign of His Majesty King George the Third, in the year of Our Lord one thousand seven hundred and seventy-four, as authorizes and empowers the Supreme Court to take cognizance of, and proceed in, causes, suits, and business in the exercise of ecclesiastical jurisdiction, shall cease and determine except as hereinafter mentioned.

Testamentary and intestate jurisdiction.

34. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority as that which may now be exercised by the said Supreme Court, whether within or without the Bengal Division of the Presidency of Fort William, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division.

Matrimonial Jurisdiction.

Matimonial Jurisdiction.

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction in matters matrimonial between Our subjects professing the Christian religion, and that such jurisdiction shall extend to the local limits within which the Supreme Court now has ecclesiastical jurisdiction: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

Powers of single Judges and Division Courts.

Single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, under the provisions of the thirteenth section of the aforesaid Act of the 24th and 25th years of Our reign.

Civil Procedure.

Regulation of proceedings.

37. And We do further ordain that the proceedings in all matters coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its testamentary and intestate jurisdiction, shall be regulated by the rules relating to the granting of probate and letters of administration contained in the aforesaid Letters Patent of His Majesty King George the Third, and by such further or other rules in respect thereof as are now in force; and that the proceedings in all matters coming before the said High Court in the exercise of its matrimonial jurisdiction shall be regulated, as nearly as may be, by the rules and proceedings of Our Court for Divorce and Matrimonial Causes in England; and that, save as hereinbefore in this clause otherwise provided, the proceedings in Civil suits of every description between party and party brought in the said High Court shall be regulated by the Code of Civil Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and by such further or other enactments of the Governor-General in Council in relation to Civil Procedure as are now in force: Provided always, that the regulations of such proceedings respectively shall be subject to such laws and regulations as shall be hereafter made by the Governor-General in Council in relation to such proceedings respectively.

Criminal Procedure.

Regulation of proceedings.

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said Supreme Court now has jurisdiction shall be regulated by the procedure and practice now in use in the said Supreme Court, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other enactments of the Governor-General in Council in relation to Criminal Procedure as are now in force: Provided always, that the regulation of such proceedings respectively shall be subject to such laws and regulations as shall be hereafter made by the Governor-General in Council in relation to such proceedings respectively.

Appeals to Privy Council.

Power to Appeal.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs or successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal made on appeal

and from any such final judgment, decree, or order made in the exercise of original jurisdiction by a majority of the full number of Judges of the said High Court as hereinbefore mentioned: Provided in either case that the sum or matter at issue is above the amount or value of Rupees 10,000 or in case such judgment, decree or order shall involve, directly or indirectly, any claim, demand, or question to or respecting property amounting to or of the value of Rupees 10,000; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council. Subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency. Except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgments.

40. And We further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Appeal in criminal cases, &c.

41. And We do further ordain that, from any judgment, order, or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advice of Our Privy Council, hereafter make in that behalf.

Rules as to transmission of copies of evidence and other documents.

42. And We do further ordain that, in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against.

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree, or decretal orders, or other order or rule of the said High Court should or might have been executed.

The Judges of the High Court are bound to record the reasons for their decisions—*Rungappa* vs. *Rungappa*, 12 Moore, 503; these reasons should be stated publicly at the hearing, and not reserved to influence the Court of Appeal *Richer* vs. *Voyer*, 5 L. R., P. C., 481. See Appeals to the Queen in Council, p. 427, *ante*.

Call for Records, &c., by the Government.

High Court to comply with requisition from Government for records, &c.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as such Government may deem proper.

Provisions of former Letters Patent, inconsistent with the Acts 24 and 25 Vic., c 104, and with these Letters Patent, to be void on the establishment of the High Court.

44. And it is Our further will and pleasure that, from and after the establisnment of the said High Court of Judicature at Fort William in Bengal, so much of the aforesaid Letters Patent granted by His Majesty King George the Third, as is inconsistent with the recited Act, and with these Letters Patent, shall cease, determine, and be utterly void to all intents and purposes whatsoever.

IN WITNESS whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the fourteenth day of May, in the twenty-fifth year of Our reign.

By Warrant under the Queen's Sign Manual,

C. ROMILLY.

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28 *Victoria, c.* 15.

Act extending the time for granting fresh Letters Patent for the High Courts in India.

[*7th April* 1865.]

XXIV and XXV Vic., c. 104.

WHEREAS it is expedient to extend the time fixed for granting fresh Letters Patent for the High Courts in *India* under the provisions of an Act passed in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, entitled *an Act for establishing High Courts of Judicature in India*, and to make further provision than is in the said Act contained for empowering the alteration, from time to time, of the local limits of the said High Courts, and for the exercise, in places beyond the limits of the Presidencies, or places within and for which such High Courts are established, of the jurisdiction and powers conferred by Her Majesty's Letters Patent on the said High Court: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extension of time for granting fresh Letters Patent.

1. The time fixed for granting fresh Letters Patent for the High Courts in *India* by section 17 of the said recited Act, is hereby extended to the first day of *January*, one thousand eight hundred and sixty-six.

Sections 10 and 18 of XXIV and XXV Vic., c. 104, repealed.

2. Sections 10 and 18 of the said Act of the twenty-fourth and twenty-fifth years of Her present Majesty are hereby repealed.

Power to the Governor-General in Council to alter local limits of jurisdiction of the High Courts.

3. It shall be lawful for the Governor-General of *India* in Council, by order, from time to time, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts establishedied to be established under the said Act, and to authorize and empower any High Court to exercise all or any portion of the jurisdiction and powers conferred on it by Her Majessy's Letters Patent establishing the same, or any other Letters Patent issued by Her Majesty under the provisions of the above recited Act of the twenty-fourth and twenty-fifth years of Her Majesty, within any such portions of Her Majesty's dominions in *India*, not included within the limits of the Presidency or place or places for which such High Court was established, as the said Governor-General in Council may from time to time determine, and also to exercise any such jurisdiction in respect of Christian subjects, of Her Majesty, resident within the dominions of such of the Princes and States of *India* in alliance with Her Majesty as the said Governor-General in Council may in manner aforesaid, from time to time determine, anything in the said recited Act of the twenty-fourth and twenty-fifth years of Her present Majesty notwithstanding.

Power to Crown to disallow any order of the Governor-General for that purpose.

4. Whenever any such order has been passed by the Governor-General in Council, he shall transmit to the Secretary of State for *India* an authentic copy thereof; and it shall be lawful for Her Majesty to signify, through the Secretary of State for *India* in Council, Her disallowance of such order; and such disallowance shall make void and annul such order from and after the day on which the Governor-General shall make known by proclamation, or by signification to his Council, that he has received the notification of such disallowance by Her Majesty: Provided always that all acts, proceedings, and judgments done, taken, or given by such High Courts, and not set aside by any competent authority before the promulgation or signification as aforesaid of such disallowance by Her Majesty, shall be deemed to be and to have been valid and effectual for all purposes whatever, such disallowance notwithstanding.

Time when Act shall come into operation.

5. So much of this Act as relates to the jurisdiction of the High Courts shall commence and come into operation as soon as the same shall have been published by the Governor-General in Council.

Not to interfere with certain powers of Governor-General.

6. Nothing in this Act contained shall interfere with the powers of the Governor-General in Council at meetings for the purpose of making Laws and Regulations.

LETTERS PATENT.

For the High Court of Judicature at Fort William in Bengal, dated 28th December 1865.

[*The Preamble is the same as the Preamble to the Letters Patent of* 1862, *ante.*]

Revocation of Letters Patent of 1862.

1. Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third, dated the twenty-sixth March, one thousand seven hundred and seventy-four, establising a Supreme Court of Judicature at Fort William in Bengal, were revoked or determined thereby.

High Court at Fort William to be continued.

2. And We do by these presents grant, direct and ordain that notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid; and that the said Court shall be and continue a Court of Record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority.

Judges of the said High Court to be continued.

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of these Letters Patent be the Chief Justice or Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges, or acting Chief Justice or Judges of the said High Court, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India.

Clerks, &c., of the said High Court to be continued.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, shall continue to hold and enjoy his office and employment, with the salary thereunto annexed, until he be removed from such office and employment; and he shall be, subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent.

[*Sections* 5, 6, 7, 8 *are exactly the same as sections* 3, 4, 5, 6, *of the Letters Patent of* 1862, *ante.*]

Admission of Advocates, Vakeels, and Attorneys.

Powers of High Court in admitting Advocates, Vakeels, and Attorneys.

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enroll such and so many Advocates, Vakeels, and Attorneys as to the said High Court shall seem meet; and such Advocates, Vakeels, and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

In making rules for the qualification, &c., of Advocates, Vakeels, and Attorneys.

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels and Attorneys-at-law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law; and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor.

11. [*This Section is exactly the same as section* 11 *of the Letters Patent of* 1862, *ante, with the difference that instead of the words "By any Law or Regulation made by the Governor-General in Council" the words "By any law made by competent legislative authority for India" are substituted. In the Madras and Bombay Letters Patent the words are "By any law made by the Governor in Council." In the* $\frac{\textit{Bombay}}{\textit{Madras}}$ *Letters Patent after the words "ninety-four," are inserted "within the limits of the local-jurisdiction of the said High Court of* $\frac{\textit{Bombay}}{\textit{Madras}}$ *at the date of the publication of these presents."*]

Original jurisdiction as to suits.

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits: except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees.

See note at pp. 28-32, *ante*.

When the cause of action arises only partly within the local limits, the leave of the Court must be obtained before the institution of the suit—*Abdool Hamed* vs. *Promothonath Bose*, 1 Ind. Jur., (N. S) 218, and leave to sue under this section cannot be implied from the fact that leave to sue as a pauper has been granted to plaintiff, leave for the former purpose must be distinctly sought and obtained—*Jairam Narayan Raje* vs. *Atmaram Narayan Raje*, 1. 1. R., 4 Bom., 482. It will not be given when the plaintiff, defendant and the witnesses reside at a long distance from Calcutta, and any decree that may be obtained can be satisfied from property outside local jurisdiction—*Radha Bibee* vs. *Mucksoodun Doss*, 21 W. R., 204. An appeal lies from the order—*DeSouza* vs. *Coles*, 3 Mad., 385. Leave to institute a suit was refused by one Judge on the 30th of June 1874. The

unsuccessful party did not appeal, but made the same application to another Judge on the 15th December and the lease was granted. *Held*, on appeal, that the order should not have been made and should be discharged—*Mudelly* vs. *Mudelly*, 8 Mad., 21.

Leave was granted in the following cases, namely—*Prasannamayi Dasi* vs. *Kadambini Dasi*, 3 Ben., 85; *Kartick Churn Setty* vs. *Gopalkisto Paulit*, 3 Ind., Cal., 264; *Barah Meah* vs. *Khajee Meah*, 44 Mad., 218, and refused in the following cases—*DeSouza* vs. *Coles*, 3 Mad., 384; *Radha Bibee* vs. *Mucksoodun Doss*, 21 W. R., 204.

The plaintiff sued the defendant for partition of family property, which consisted both of moveable and immoveable property. The moveable property was within the jurisdiction, but all the immoveable property was outside the jurisdiction of the Court. *Held*, that the Court had no jurisdiction to hear the suit—*Jairam Naragan Raje* vs. *Atmaram Narayan Raje*, I. L. R., 4 Bom., 482. The words "*all other cases*" in section 12 do not include cases of suits for immoveable plus moveable property. They refer to cases in which immoveable property is not involved—*Ibid.*

It is not necessary to obtain the leave of the High Court under clause 12 of the Letters Patent, to sue to set aside a decree of that Court made upon a compromise to which the plaintiff has been induced by the misrepresentations of the defendant to agree, even when it appears from the plaint that the defendants are outside the jurisdiction of the Court—*Bibee Soloman* vs. *Abdool Aziz*, 4 C. L. R., 366.

13. [*This section is exactly the same as section* 13 *of the Letters Patent of* 1862, *ante.*]

Joinder of several causes of action.

14. And We do further ordain that, where plaintiff has several causes of action, against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

15. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a sentence or order passed or made in any criminal trial of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors, in Our or Their Privy Council, as hereinafter provided.

Under this section an appeal has been allowed from any judgment (not being a sentence or order passed in a criminal trial) of a decision Court in the exercise of its appellate jurisdiction, when the Judges of the Court were equally decided in opinion and did not amount in number to a majority of all the Judges—*Ranee Shurnomoyee* vs. *Luchmeeput Doogur*, 7 W. R., 52, 512; so an appeal has been allowed from a decision under Act VIII, 1859, 1257—*Nundaput Mahtu* vs. *Urquhart*, 13 W. R., 209; and so also, though not without doubt, from an order passed by the English Committee dismissing a Munsif—*Hurish Chunder Mitter*, Petitioner, 18 W. R., 209; and from a decision passed under Act VIII of 1859, section 338—*Ameer Ali* vs. *Kassim Ali Khan*, 13 W. R., 403; from a decision of a Judge in the Privy Council department refusing to execute a decree—I. L. R., 6 Cal., 594, from an order deciding the claims of relatives to be guardian of a minor—*Kristo Kissor Neoghy* vs. *Kadermoyee Dossee*, 2 C. L. R., 583.

The provisions of this section are modified by section by 575, p. 434 *ante.*, *Appaji* vs. *Sherlal*, I. L. R., 304; *Balaji* vs. *Manager of Estate of Mohunlal*, I. L. R., 5 Bom. 680.

To support an appeal it must be shown that the order appealed against is a judgment—*The Justices of the Peace for Calcutta* vs. *The Oriental Gas Company*, 17 W. R., 364, and that the difference of opinion is as regards the final and complete disposal of the case—*Omrao Begum*, Petitioner, 13 W. R., 310 ; *Chunder Kant Butacharjee* vs. *Bindabun Chunder Mookerjee*, 7 W. R., 277. Thus an appeal lies from an order rejecting a review—*Rughoo Bibee* vs. *Noor Jehan*, 12 W. R., 459 ; nor from an order issuing a *mandams*—*The Justices of the Peace for Calcutta* vs. *The Oriental Gas Company*, 17 W. R., 364, nor from an order granting (?) or refusing a certificate to appeal to the Privy Council—*Mowla Buksh* vs. *Hodgkinson*, 24 W. R., 150 ; *Tarachand Biswas* vs. *Radha Jeebun Mustofee*, 24 W. R., 148—See however, *Hurrish Chunder* vs. *Kali Sundari*, L. R., 10, Ind. App., 4.

An application made to the High Court under this action was refused, the Judge saying that the plaintiff was not entitled to execute the decree. *Held*, that an appeal would lie under section 15 of the Letters Patent—*Kali Sundari Debi* vs. *Hurrish Chunder Chowdhry*, 7 C. L. R., 543.

Points not raised before a Divisional Bench cannot be raised on appeal—*Hazara Begum* vs *Ali Khan*, 12 W. R., 498.

On second appeal before a singal Judge of the High Court an order was made directing the trial of certain issues of Law and part by the lower Appellate Court, the case being meanwhile directed to remian in the High Court file. *Held* that there was no appeal from that order—*Kali Kristo Pal Chowdhry* vs. *Ram Chunder Nag*, 9 C. L. R., 461.

Limitation.—The period of limitation has been held to be thirty days from the date of the judgment, unless good cause, such as that a copy of the judgment could not be obtained, be shown before the Appellate Bench to the contrary—*Truck Sing*, Petitioner, 11 W. R., 107; 12 W. R., 458.

Appeal from Courts in the Provinces.

16. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

17. [*This section is the same as section* 16 *of the Letters Patent of* 1862, *ante, save that for the words "within or without" is substituted the word "within."*]

Provision with respect to the Insolvent Court.

18. And We do further ordain that the Court of Relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction, and otherwise, as are constituted by the laws relating to insolvent debtors in India.

This section narrows the jurisdiction of the Insolvent Court to the Bengal Division of the Presidency of Fort William—In the matter of *Tietkins*, 1 Ben., 84.

Law to be administered by the High Court of Judicature at Fort William in Bengal.

By the High Court in the exercise of ordinary original civil jurisdiction.

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

20, 21. [*These sections are the same as sections* 19 *and* 20 *of the Letters Patent of* 1862, *ante, save that after the word "shall" in section* 19, *the words "until otherwise provided" are added.*]

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William and beyond such limits, and not within the limits of the criminal jurisdiction of any other High Court or Courts established by competent legislative authority for India, as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these Presents.*

"And also in respect of all such persons beyond such limits, or over whom the said High Court of Judicature at $\frac{\text{Madras}}{\text{Bombay}}$ shall have criminal jurisdiction at the time of publication of these presents."—*Madras and Bombay Letters Patent.*

Jurisdiction as to persons.

23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

24. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try, at its discretion, any such person brought before it on charges preferred by the Advocate-General, or by any Magistrate or other Officer specially empowered by the Government in that behalf.

25, 26. [*These sections are the same as sections* 24, 25, *of the Letters Patent of* 1862, *ante, save that in sectian* 24 *of* 1862 *the words "or made" follow the word "passed."*]

Appeals from Criminal Courts in the Provinces.

27. And We do further ordain that the said High Court of Judicature at Fort Willian in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Hearing of referred cases and revision of criminal trials.

28. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said High Court.

29. [*This section is exactly the same as section* 28 *of the Letters Patent for* 1862.]

Criminal Law.

Offenders to be punished under Indian Penal Code.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of Appeal, reference, or revision, charged with any offence for which provision is made by Act XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Judges may be authorized to sit in any places by way of circuit or special commission.

31. And We do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceeding in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

32. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such Civil and Maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India, as may now be exercised by the said High Court.

Criminal.

33. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

34. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority as that which may now be lawfully exercised by the said High Courts except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division, subject to the orders of the Governor-General in Council as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for

which it was established :* Provided always, that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

* "And We do further ordain that the said High Court of Judicature at $\frac{\text{Bombay}}{\text{Madras}}$, shall have the like power and authority as that which may be now lawfully exercised by the said High Court in relation to the granting of probates of last wills and testament, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate whether within or without the Presidency of $\frac{\text{Bombay}}{\text{Madras}}$ "provided always;"—*Madras and Bombay Letters Patent.*

Matrimonial Jurisdiction.

Matrimonial jurisdiction.

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction, within the Bengal Division of the Presidency of Fort William, in matters matrimonial between Our subjects professing the Christian religion: Provided always, that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

Powers of Single Judges and Division Courts.

Single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, under the provisions of the thirteenth section of the aforesaid Act of the twenty-fourth and twenty-fifth years of Our reign; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.

Civil Procedure.

Regulation of proceedings.

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdictions, respectively: Provided always, that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.

Criminal Procedure.

Regulation of proceedings.

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal juris-

diction, and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act XXV of 1861, or by such further or other law in relation to Criminal Procedure as may have been or may be made by such authority as aforesaid.

Appeal to Privy Council.

Power to appeal.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by a majority of the full number of Judges of the said High Court [or of any Division Court, from which an appeal shall not lie to the said High Court, under the provisions contained in the 15th Clause of these presents:] Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rupees 10,000, or that such judgment, decree, or order shall involve, directly, or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than Rupees 10,000, or from any other final judgment, decree, or order made either on appeal or otherwise aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council; subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders respectively, are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

40, 41, 42, 43. [These sections are exactly the same as sections 40, 41, 42, 43, of the Letters Patent of 1862.

Powers of Indian Legislature preserved.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council exercised at meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of Our reign, Chapter sixty-seven, and may be in all respects amended and altered thereby.

Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty King George the Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever.

BENGAL SECRETARIAT LIBRARY

In Witness thereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the twenty-eighth day of December, in the 29th year of Our reign.

(Sd.) ROMILLY.

LETTERS PATENT establishing a HIGH COURT in the NORTH-WESTERN PROVINCES of the Bengal Presidency, dated March 17th 1866.

[The two first paragraphs of the Preamble are similar to those of the Letters Patent of 1865, *ante*.]

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said Presidencies, as We from time to time might think fit and appoint; and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency in which such High Courts were established, shall, as far as cricumstances may permit be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories.

And whereas We did, upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, the fourteenth day of May, in the twenty-fifth year of Our reign, in the year of Our Lord one thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, a High Court of Judicature, which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record:

Establishment of High Court for the North-Western Provinces.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by those presents We do accordingly, for Us, Our heirs and successors, erect and establish, for the North-Western Provinces of the Presidency of Fort William aforesaid, a High Court of Judicature which shall be called the High Court of Judicature for the North-Western Provinces, and We do hereby constitute the said Court to be a Court of Record:

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces shall, until further or other provision shall be made by Us, or Our heirs and successors in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire, William Edwards, Esquire,

William Roberts, Esquire, Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges.

3. And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature for the North-Western Provinces, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—

"I, *A. B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge, and judgment."

4 to 8. [These sections are similar to sections 6 to 10 of the Letters Patent of 1865.]

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

10, 11. [These sections are similar to sections 15 and 16 of the Letters Patent of 1865, *ante*.]

Jurisdiction as to infants and lunatics.

12. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the North-Western Provinces as that which is exercised in the Bengal Division of the Presidency of Fort William by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force.

13, 14. [These sections are similar to sections 15 and 16 of the Letters Patent of 1865, *ante*.]

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

15. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have ordinary original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents; and the criminal jurisdiction of the said last-mentioned High Court over such persons shall cease at such date: Provided, nevertheless, that criminal proceedings which shall at such date have been commenced in the said last-mentioned High Court shall continue as if these presents had not been issued.

Jurisdiction as to persons.

16. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

17. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other Officer specially empowered by the Government in that behalf.

18. [This section is similar to section 25 of the Letters Patent of 1865, *ante*.]

High Court to review cases on points of law reserved by one or more Judges of the said High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Appeals from Criminal Courts in the Provinces.

20. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall be a Court of Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

Hearing of referred cases, and revision of criminal trials.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Prrovinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

High Court may direct the transfer of a case from one Court to another.

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

23. [This section corresponds with section 30 of the Letters Patent of 1865, *ante*.]

Judges may be authorized to sit in any places by way of circuit or special commission.

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act vested in the said High Court, should be exercised in any place within the jurisdiction of any Court, now subject to the superintendence of any Sudder Dewanny Adawlut or the Sudder Nizamut Adawlut of the North-Western Provinces other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

25. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have the like power and authority as that which is now lawfully exercised within the said Provinces by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last-mentioned High Court in relation thereto shall cease from the date of the publication of these presents: Provided always, that any proceedings already commenced in relation to any of the matters aforesaid in the said last-mentioned High Court shall continue as if these presents had not been issued: Provided also, that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

26, 27. [These sections correspond with sections 35 and 36 of the Letters Patent of 1865, *ante*.]

Civil Procedure.

Regulation of Proceedings.

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adapting, as far as possible, the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdictions respectively.

Criminal Procedure.

Regulation of proceedings.

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original Criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in

all other criminal cases shall be regulated by the Code of Criminal procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

Power to appeal.

30. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature for the North-Western Provinces made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provision contained in the 10th Clause of these presents: Provided, in either case, that the sum or matters at issue is of amount or value of not less than 10,000 Rupees, or that such judgment, decree, or order shall involve directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than 10,000 Rupees; or from any other final judgment, decree, or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council, subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Provinces; except so far as the said existing rules and orders, respectively, are hereby varied, and subject also to such further rules and orders as we may, with the advice of Our Privy Council, hereafter make in that behalf.

By Warrant under the Queen's Sign Manual,

C. ROMILLY.

MOFUSSIL SMALL CAUSE COURTS.

ACT XI OF 1865.

Mofussil Small Cause Courts.

[*Received the Governor-General's assent on the* 15*th March* 1865.]

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the Ordinary Original Civil Jurisdiction of the High Courts of Judicature; It is enacted as follows:—

Interpretation clause.

Number.

Gender.

"Judge."

"Section."

"Court of Small Causes."

1. In this Act, unless there be something repugnant in the subject or context, words importing the singular number include the plural, and words importing the plural number include the singular.

Words importing the masculine gender include females.

"Judge" includes an acting Judge.

"Section" means a Section of this Act.

"Court of Small Causes" means a Court constituted under this Act.

And in every part of British India in which this Act operates, "Local Government" denotes the person authorized to administer the executive government in such part, and "High Court" denotes the highest Civil Court of appeal having jurisdiction therein.

"Local Government."
"High Court."

This Act extends to all British India, except the Scheduled Districts—Act XIV, 1870.

2. Any Courts of Small Causes now in existence which shall have been constituted under Act XLII of 1860 shall be considered as constituted under this Act within the territorial limits of the jurisdiction assigned to such Courts under the said Act XLII of 1860 or which may hereafter be assigned to them under the next following section, and shall be subject to all the provisions contained herein.

Repeal of Acts XLII of 1860 and XII of 1831.

See Act XIV of 1870.

3. The local Government may, with the previous sanction of the Governor-General of India in Council, constitute, for the trial of suits under this Act, Courts of Small Causes, with such establishment of Officers as may be necessary, at any places within the territories under such Government.

Constitution of Small Cause Courts.

Whenever a Court of Small Causes shall be so constituted, the local Government shall fix the territorial limits of the jurisdiction of such Court and may from time to time alter the limits so fixed. The local Government may abolish any Court of Small Causes.

Limits of their territorial jurisdiction to be fixed by local Government.

LOCAL GOVERNMENT.—This does not include a Chief Commissioner—*Koshoay Doon* vs. *Shoay Gan*, 6 Ben., 196.

4. Every Court of Small Causes shall use a seal bearing the following inscription in English and in the language of the Court—"Court of Small Causes of " and shall be subject to the general control and orders of the High Court.

Seal of the Court.

Courts to be generally subject to the High Court.

As to the powers of the High Court, see the case of *Munnoo Singh*, Petitioner, 19 W. R., 306.

A Small Cause Court is a Court of inferior jurisdiction—In re *Jugessur Roy*, 5 C. L. R., 170.

5. Courts of Small Causes shall be held at such place or places within the local limits of their respective jurisdictions as shall from time to time be appointed by the local Government.

Places where Courts to be held.

6. The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage or demand does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise: Provided that no action shall lie in any such Court:—

Suits cognizable by Small Cause Courts.

Proviso.

(i) On a balance of partnership account, unless the balance shall have been struck by the parties or their agents;

(ii) For share or part of a share under an intestacy, or for a legacy or part of a legacy under a will;

(iii) For the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury.

(iv) For any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer, unless, as regards arrears of rent for which such suits may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the local Govermment with jurisdiction over claims to such arrears.

See note at pp. 23-25, *ante*.

A suit will lie in a Small Cause Court for profits of a mouzah appropriated by one sharer in excess of his share—*Asman Singh* vs. *Durga*, 7 C. L. R., 94, though a suit involving questions of partnership will not—*Ram Torun* vs. *Peary Mohun*, 7 C. L. R., 557. A suit for contribution by one surety against another will lie if the sureties are bound by the same instrument—*Hari* vs. *Abasaheb*, I. L. R., 4 Bom., 321; but a suit for contributions by a co-sharer who has paid the entire Government revenue will not and the case of one joint tenant is doubtful—*Nobin Krishna* vs. *Ram Kumar*, 9 C. L. R., 90.

A suit for possession of personal property to which the plaintiff has been entitled by a declaratory decree is cognizable by a Court of Small Causes—*Moheshur Mondul* vs. *Koilash Nath Mondul*, 7 C. L. R., 71, but a suit to declare the right to attach and sell certain moveable property as that of a judgment-debtor is not—*Chhagonlal* vs. *Jeshan*, 1 I. L. R., 4 Bom., 503. Nor will a suit to declare that a decree upon a mortgage bond is enforceable against the person and property of the purchaser of the mortgaged property who had removed the matters of the same cognizable—*Omer Kurim* vs. *Shewan Lal*, 4 C. L. R., 291. Nor a suit for maintenance not arising out of a bond or special contract—*Sidlingapa* vs. *Sidana*, I. L. R., 2 Bom., 624; *Apaji* vs. *Esangabai*, I. L. R., 2 Bom., 632. A suit to recover *baluta* is cognizable—*Naru Piru* vs. *Naso*, I. L. R., 3 Bom., 28.

The Court has power to award costs when the suit is dismissed for a suit of jurisdiction—*Freck* vs. *Harley*, 7 C. L. R., 237.

Powers to extend jurisdiction of Small Cause Courts to one thousand rupees.

7. The local Government may extend the jurisdiction of any Court of Small Causes, in suits of the nature described in the last preceding section, and thereby made cognizable by Courts of Small Causes, to an amount not exceeding one thousand rupees.

8, 9, 10, 11. [*These sections are repealed by the Code. See the first Schedule.*]

Suits cognizable by a Court of Small Causes not to be heard by any other Court having jurisdiction within the local limits.

12. Wherever a Court of Small Causes is constituted under this Act, no suit cognizable by such Courts shall be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes: Provided that nothing in this Act shall be held to take away the jurisdiction which a Magistrate or a person exercising the powers of a Magistrate, or an Assistant or Deputy Magistrate, can now exercise in regard to debts or other claims of a civil nature, or the jurisdiction which can be exercised by Village Munsiffs or Village or District Panchayats, under the provisions of the Madras Code; or by Military Courts of request or by Cantonment Joint-Magistrates invested with Civil Jurisdiction under Act III of 1859 (*for conferring Civil Jurisdiction in certain cases upon Cantonment Joint-Magistrates, and for constituting those Officers Registrars of Deeds*); or by a single Officer duly authorized and appointed under the

Saving of jurisdiction of Magistrates as to debts.

Of Village Munsiffs and Village or Districts Panchayats in Madras.

Of Military Courts of Request.

rules in force in the Presidencies of Madras and Bombay respectively, for the trial of small suits in Military Bazars, in Cantonments, and Stations occupied by the troops of those Presidencies, respectively; or by Panchayats in regard to suits against military persons according to the rules in force in the Presidency of Madras.

Of officers appointed to try small suits in Madras and Bombay.

Or of Military Panchayats in Madras.

A Small Cause Court can try suits for wages against European British subject, though this section may preserve the jurisdiction of Magistrates which was created by Act 53, G. III. c. 155, s. 106—*Mirza Ruhman Beg.* vs. *Cook*, 14 W. R. 428.

In a suit against two defendants, one of whom resided within the local limits of the Court, and the other outside the local limits, but within the jurisdiction of a neighbouring Munsiff, the Small Cause Court Judge and not the Munsiff should try the case—*Khoda Buksh Mistrie* vs. *Banee Mundul*, 14 W. R., 156; *Tarinee Chunder* vs. *Poorno Chunder*, 15 W. R., 397.

Military Officers are exempt from jurisdiction in certain cases by the Mutiny Act—*Hossein* vs. *Dickinson*, 2 Ben., S. N. iii.

13. Every Court of Small Causes shall (except as hereinafter provided) be held before a Judge appointed by the local Government, and who shall receive such salary as the Governor-General of India in Council may from time to time determine. Such Judge shall be the Judge either of such Court or of two or more such Courts as the local Government shall appoint, but except as hereinafter provided, he shall not exercise any Civil Jurisdiction except under the provisions of this Act.

Judge of Court.

14. It shall be lawful for any Judge who is the Judge of two or more Courts of Small Causes to fix, subject to the orders of the local Government, or, in territories under the immediate administration of the Government of India, of the Chief Commissioner, or other principal civil authority, the times at which he will go on circuit, and the dates on which his sittings, in the several Courts of which he is Judge shall commence. Notice of such times and dates shall be published in the Official Gazette, and at such places and in such manner as the local Government or Chief Commissioner or other authority as aforesaid shall think fit to direct in that behalf.

Power of Judge of several Courts to fix times and dates of circuits and sittings.

15. The local Government may from time to time invest any person with the powers of a Judge of a Court of Small Causes under this Act for a limited period, or for specific periods in each year only, and declare in what Court or Courts of Small Causes such powers shall be exercised by such person. Any person so invested shall, in all Courts in which the local Government shall have declared that he shall exercise the said powers, have all such powers as might in such Courts be exercised by a Judge of the said Courts appointed under the thirteenth section.

Local Government may invest any person, for a limited period, with powers of Judge of Court of Small Causes.

Powers to be exercised by persons so invested.

16. If it shall be declared by the local Government that any person invested under the last preceding section with the powers of a Judge of a Court of Small Causes, shall exercise those powers in a Court of which there is a Judge appointed under the thirteenth section, the person so invested shall exercise a jurisdiction concurrent with that of such Judge. The local Government shall from time to time make rules to provide for the distribution of business between any person so invested

Jurisdiction to be exercised by persons so invested in Court in which there is a Judge.

and any Judge in whose Court it may be declared that such person shall exercise his powers, and generally for regulating and defining the duties and relative positions of Judges of Courts of Small Causes and persons so invested as aforesaid: Provided always that no such rule shall be in any way inconsistent with the provisions of this Act.

Remuneration of Judges and of persons invested with powers of Small Cause Court Judge, and restriction from practising within the limits.

17. Every person invested with the powers of a Judge of a Court of Small Causes under the fifteenth section shall receive such renumeration as the Governor-General in Council shall from time to time determine. It shall not be lawful for any such person to practise as a Barrister, Attorney, Vakeel, Pleader, or Law Agent in any District or place within the territorial limits of which he is empowered to exercise the powers with which he is invested.

Summons.

18. In all suits under this Act the summons to the defendant shall be for the final disposal of the suit, and no written statement, other than the plaint, shall be received unless required by the Court.

In suits cognizable by Small Cause Courts, Court may, on the judgment-creditor's application, direct immediate execution against the judgment-debtor's person or moveable property.

19. When a decree is passed in any suit of the nature and amount cognizable under this Act, the Court passing the decree may, at the same time that it passes the decree on the verbal application of the party in whose favour the decree is given, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor, if he is within the local limits of the jurisdiction of the Court passing the decree, or against the moveable property of the judgment-debtor within the same limits.

This section only applies to cases in which the decree-holder wishes to have immediate execution—*Anonymous case*, 9 W. R., 174. The Court may refuse execution against the person and property at the same time—*Davis* vs. *Middleton*, 8 W. R., 282. A debtor is not entitled to immunity from arrest until he has had a reasonable time to return home—*Depenning* vs. *Moitro*, 9 W. R., 349.

Huts are not moveable property within the meaning of this section—*Nutto Miah* vs. *Nundo Ranee*, 17 W. R., 309.

Growing crops are not moveable property—*Gopal Chunder Biswas* vs. *Ramjan Sirdar*, 5 Ben., 194; but thatch, especially if severed is—*Raj Kumar* vs. *Prannath*, 7 Ben. App., 41.

Execution against immoveable property, if moveable property not sufficient.

20. In the execution of a decree under this Act, if after the sale of the moveable property of a judgment-debtor, any portion of a judgment-debt shall remain due, and the holder of the judgment desire to issue execution upon any moveable property belonging to the judgment-debtor, the Court, on the application of the holder of such judgment, shall grant him a copy of the judgment and a certificate of any sum remaining due under it, and on the presentation of such copy and certificate to any Court of Civil Judicature having general jurisdiction in the place in which the immoveable property of the judgment-debtor is situate, such Court shall proceed to enforce such judgment according to its own rules and mode of procedure in like cases.

The decree of a Small Cause Court may be sent to another Court for execution against immoveable property—*Anonymous case*, 9 W. R., 175. A certificate of non-satisfaction having been obtained from the Small Cause Court of Noral, the decree was transferred to the Munsif's Court there, when the judgment-debtor pleaded limitation. Before application to execute was filed, the Small Cause Court was abolished. It was decided that, though the Munsif would not ordinarily be able to decide the question of limitation, he could, as representative of the Small Cause Court Judge, do so—*Hormut Doss*, Petitioner, 24 W. R., 151.

Decision in suits tried under this Act to be final.

Ex-parte decree may be set aside.

21. In suits tried under this Act, all decisions and orders of the Court shall be final: Provided that, in any case in which a decree shall be passed *ex-parte* against a defendant, he may, within thirty days after any process for enforcing the decree has been executed, give notice to the Court by which the decree was passed, of his intention to apply to the Court at its next sitting for an order to set aside; and if, on the application being made to the Court at its next sitting it shall be proved to the satisfaction of the Court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was heard, the Court shall pass an order setting aside the decree, and shall appoint a day for proceeding with the suit, upon such terms as to costs or otherwise as shall to the Court seem proper: Provided also that it shall be competent to the Court, if it shall think fit, in any case not falling within the proviso last aforesaid, to grant a new trial, if notice of the intention to apply for the same at the next sitting of the Court be given to the Court within the period of seven days from the date of the decision, and if the same be applied for at the next sitting of the Court; but no such new trial shall be granted where the party applying for the same is the defendent or one of the defendents, unless he shall, with his notice of application, deposit in Court the amount for which a decree shall have been passed against him including the costs (if any) of the opposite party.

New trial.

On deposit of debt and costs.

When a judgment of a Small Cause Court is called into question for fraud or false personation—*Huro Monee Dossee*, Petitioner, 17 W. R., 48, or on a point of law, a new trial should be applied for—*Ishan Chunder Singh* vs. *Haran Sirdar*, 11 W. R., 525, within the period mentioned in this section excluding the date of decision—*Bijoy Gobind Debi* vs. *Muddun Ram*, 18 W. R., 454, or if on the last day of filing, the Court is shut then on the next day on which the Judge sits—*Grija Bhoosun Haldar* vs. *Obhoy Nikeree*, 13 W. R., 105; *Madhub Chunder Biswas* vs. *Okhoy Chunder Biswas*, 13 W. R., 103; *Koylash Chunder Sannel* vs. *Asalut Shaikh*, 14 W. R., 42. The applicant must deposit the amount of the decree—*Koylash Chunder Sannel* vs. *Asalut Shaikh*, 14 W. R., 42; but not the defendant's costs—*Mohima Chunder Roy* vs. *Hurnath Chungo*, 18 W. R., 446. Apparently no second application can be entertained, after the dismissal of the first—*Dhunno Chowdhry* vs. *Bukshur*, 12 W. R., 266; but see *Gopal Chunder Roy* vs. *Arman Shaikh*, 15 W. R., 402; and *Kanooram's* case at 19 W. R., 203.

A party who applies for and obtains a new trial on particular materials, he should not be allowed to go into fresh evidence with a view to strengthen his case on other points—*Madhoosoodun* vs. *Sewloll*, 15 W. R., 161.

A Judge should be very careful in granting new trials in cases decided by his predecessor—*Shumsher Ali* vs. *Koorkut Shah*. 6 C. L. R., 549.

22, 23, 24, 25, 26, 27, 28. [These sections are repealed by the Code—see the first schedule.]

Power to appoint one of the Courts of a District to be the Principal Court.

29. Whenever more Courts than one are constituted in any District under this Act, the local Government may appoint one of the same Courts to be the Principal Court of Small Causes in such District.

30. The Judge of the principal Court of Small Causes in any District may sit with the Judge of any other Court of Small Causes in the same District, or with a person invested with the powers of a Judge as aforesaid in such Court, for the trial and determination of any suit cognizable under this Act, and shall so sit for the trial and determination of any such suit which the Judge of such other Court, or other person as aforesaid, may reserve for trial by himself and the Judge of the principal Court of Small Causes.

Judge of Principal Court may sit with Judge of any other Court in the District for the trial of reserved suits.

31. The local Government any from time to time make rules providing that, in such cases as shall be prescribed in such rules, two Judges, or a Judge and a person invested with the powers of Judge as aforesaid, shall sit together and hear and dispose of suits and applications.

Local Government may make rules providing that two Judges shall sit together for trial of certain suits.

32. If two Judges, or a Judge and a person invested with the powers of a Judge as aforesaid, sit together, and they concur in the decision or order to be passed, such decision or order shall be the decision or order of the Court; but if they shall differ on a point of law, or usage having the force of law, or in construing a document, the construction of which may affect the merits of the decision, they shall submit a case for the opinion of the High Court on the point of difference between them, and the provisions applicable to a reference to the High Court, shall be applicable to every reference made under this section.

Procedure when two Judges differ on a point of law.

See the first schedule to the Code.

33. If two Judges differ on any matter other than the matters above-mentioned, the Judge who is senior in respect of date of appointment as a Judge of a Court of Small Causes shall have the casting voice.

Casting voice in case of difference between two Judges on a question of fact.

34. If a Judge and a person invested with the powers of a Judge as aforesaid differ on any matter other than the matters above-mentioned, the Judge shall have the casting voice.

Casting voice in case of difference on a question of fact between a Judge and a person invested with a Judge's powers.

35. It shall be lawful for the local Government to appoint to any Court of Small Causes an Officer who shall be called the registrar of the Court, and who shall be paid such salary as shall, from time to time, be authorized in that behalf by the Governor-General of India in Council.

Appointment of registrar.

36. The registrar, of every Court of Small Causes shall be the chief ministerial officer of the Court. In addition to any other duties and powers herein imposed or conferred upon the registrar, he shall, subject to the provisions contained in the next following section, receive all plaints presented to the Court; issue notice of suit to the defendants; receive any documents which the parties may wish to put in; and issue process for the attendance of their witnesses. He shall likewise keep lists of all causes coming on for trial, and fix such days for their being heard respectively as may seem to him fit. He may also receive notices under the twenty-first section.

Duties of registrar.

37. If, when the Judge is absent on duty and there is no person invested with the powers of a Judge as aforesaid, the registrar shall be of opinion that any plaint presented to the Court is defective in any of the par-

Procedure where registrar thinks plaint defective in certain particulars.

ticulars mentioned in sections twenty-seven to thirty-two, both inclusive, of the Code of Civil Procedure, he may reject the same. But it shall be lawful for the Judge, or for any person invested with the powers of a Judge as aforesaid, to reject any plaint which may have been received by the registrar, and to receive any plaint which may have been rejected by him: Provided that such reception or rejection (as the case may be) by the registrar shall, in the opinion of such Judge or other person empowered as aforesaid, have been erroneous, and that an application to set the same aside shall be made at the first subsequent sitting in the said Court of a Judge, or other person duly empowered as aforesaid.

Proviso.

38. If a suit shall have been instituted in a Court of Small Causes, and the defendant shall have been duly summoned to appear and answer therein, and if before the day appointed for the hearing of such suit, defendant or his agent duly authorized in that behalf, shall appear before the registrar of the Court and admit the plaintiff's claim, and apply for leave to confess judgment, it shall be lawful for the registrar, if the Judge be absent on duty, and there be no person invested with the powers of a Judge as aforesaid to enter on the record a decree for the plaintiff by confession, and such decree shall have the like force and effect as a decree for the plaintiff would have had if the suit had been heard by the Judge, and a decree passed by him for the plaintiff: Provided that in every case before passing a decree under this section, it shall be the duty of the registrar fully to satisfy himself of the service of the summons, of the identify of the parties, and of their good faith in appearing before him.

Registrar may receive and enter up judgments by confession.

Proviso.

39. The registrar, if the Judge be absent on duty and there be no person invested with the powers of a Judge as aforesaid, shall also receive applications for the execution of decrees passed by the Judge, or other person empowered as aforesaid of the Court of which he is the registrar, and, subject to any orders which he may receive from the Judge or such other person, shall execute them. No appeal shall lie from any order passed by the registrar under this section; but the Judge, or other person empowered as aforesaid, may, within three calendar months from the making of the order, of his own motion, reverse or modify it.

Execution of decrees by registrar.

40. The local Government may invest any registrar with the powers of a Judge of a Court of Small Causes in suits arising within the local limits of a jurisdiction of the Court of which he is the registrar, provided that the amount or value of the claim shall not exceed twenty rupees. The registrar shall exercise such powers subject to the general control of the Judge, or, when there is no Judge, of any person invested with the powers of a Judge as aforesaid.

Power to invest registrar with jurisdiction of Small Cause Court Judge in certain cases.

41. The suits cognizable by the registrar under the last preceding section shall be set down for hearing before such registrar, and he shall hear and determine such suits and execute the decrees made therein, in such manner in all respects as the Judge of the Court might hear, determine, and execute the same respectively: Provided that the Judge or when there is no Judge, the person

Hearing of suits cognizable by registrar.

Transfer from Registrar's to Judge's file.

invested with the powers of a Judge, whenever he thinks proper may transfer to his own file any suit on the file of the registrar, and may hear and determine the same.

42. [*Repealed by the first Schedule to the Code.*]

Setting aside a decree by registrar under section 38.

43. A decree passed by a registrar under the thirty-eighth section may be set aside by the Judge of the Court, or, when there is no Judge, by the person invested with the powers of a Judge as aforesaid, in such manner and on such grounds only as it might be set aside if it were a decree passed at the hearing of the cause by the Judge or other person empowered as aforesaid.

Appointment and removal of Clerk of the Court.

44. An officer to be styled the Clerk of the Court may be appointed to any Court of Small Causes, on such salary as shall be authorized by the Governor-General of India in Council. The appointment and removal of such Officer shall rest with the Court, subject to the approval of the local Government, or in territories under the immediate administration of the Government of India, of the Chief Commissioner, or other principal civil authority. The registrar of any Court of Small Causes may also be the Clerk of the Court.

Duties of Clerk.

45. When a Clerk is appointed to any Court of Small Causes, such Clerk shall, subject to the orders of the Court and the registrar, if there be a registrar, issue all summonses, warrants, orders, and writs of execution, and keep an account of all proceedings of the Court, and shall take charge of and keep an account of all moneys payable or paid into or out of the Court, and shall enter an account of all such moneys in a book belonging to the Court to be kept by such Clerk for that purpose.

High Court empowered to make rules of practice, &c.

46. High Court shall have power to make and issue general rules for regulating the practice and proceedings of Courts of Small Causes, and also to prescribe forms for every proceeding in the said Courts for which it shall think that forms should be provided, and for keeping all books, entries, and accounts to be kept by the officers, and from time to time to alter any such rule or form : Provided that such rules and forms be not inconsistent with the provisions of this Act, or of any other law for the time being in force.

47. [*Repealed by the first Schedule to the Code.*]

Saving of Act XI of 1841, section 17.

48. Nothing in the second section of the said Act III of 1859, or the sixth, seventh, and eighth sections of Act XXII of 1864, (*to make provision for the administration of Military Cantonments*), relating to the establishment of Courts of Small Causes in Military Cantonments, shall be held to affect so much of Act XI of 1841 (*for consolidating and amending the Regulations concerning Military Courts of Requests for Native Officers and soldiers in the service of the East India Company*), as declares that, in places beyond the frontier of the territories of the East India Company, actions of debt and other personal actions may be brought before the Military Courts therein mentioned, against persons so amenable as therein mentioned for any amount of demand.

Saving of jurisdiction of Courts of Requests.

49. Nothing in this Act, nor in the sixth, seventh, and eighth sections of the said Act XXII of 1864, shall be held to affect the jurisdiction of any Court of Requests convened under the hundred and third section of the Statute 27 Vic., cap. 3, or the corresponding section in any other Statute for the time being in force, for punishing mutiny and desertion, and for the better payment of the army and their quarters, or the powers of a commanding officer under any such Statute to assemble such Courts.

Reference in previous Acts to Act XLII of 1860 to be read as applying to this Act.

50. When in any Act passed prior to the coming into operation of this Act, reference is made to Act XLII of 1860, such reference shall be read as applying to this Act, and when any procedure is directed to be in accordance with the provisions of Act XLII of 1860, such procedure shall be deemed to be directed to be in accordance with the provisions of this Act.

Power to give a Small Cause Court Judge the powers of a Principal Sudder Ameen or a Magistrate.

51. Whenever the state of business in any Court of Small Causes, the Judge of which shall be the Judge of such Court only, is not sufficient to occupy his time fully, the local Government may invest him, within such limits as it shall from time to time appoint, in addition to his powers as such Judge, with the powers of a Magistrate as defined in the Code of Criminal Procedure, or, in the Regulation Provinces, with the powers of a Principal Sudder Ameen, or, in the Non-Regulation Provinces, with the powers of an Officer exercising the like or nearly the like powers as those of a Principal Sudder Ameen.

See, in Bengal, Act VI of 1871, sec. 30; and, in Madras, Act III of 1873, sec. 29.

Powers to give Small Cause Court Judge jurisdiction to hear claims under Act X of 1859.

52. In the places in which the provisions of Act X of 1859 (*to amend the law relating to the recovery of Rent in the Presidency of Fort William in Bengal*) are in force, the local Government may empower any Judge of a Court of Small Causes to hear and determine, under the rules contained in the said Act X of 1859 applicable to trials before a Collector, and subject to the same regular and special appeal, the claims cognizable under such Act arising within the local limits of the jurisdiction of such Court. Any Judge so empowered shall exercise all the powers of a Collector under the said Act X of 1859, except the power of hearing appeals.

See Act XVIII, 1873, sec. 2.

Small Cause Courts to furnish records, &c., called for by local Government or High Court.

53. Courts of Small Causes shall comply with such requisitions as may, from time to time, be made by the local Government or the High Court for records, returns, and statements in such form and manner as such Government or Court may deem proper.

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